LLWnotes

Volume 13, Number 7 June/July 1998

Texas Compact/Texas

Judges Find Texas Authority's Application Inadequate in Two Areas

But Judges Agree that Facility is Needed, Performance Assessment is Adequate

Two administrative law judges who conducted evidentiary hearings on the Texas Low-Level Radioactive Waste Disposal Authority's application for a license to construct and operate a disposal facility have issued a "proposal for decision" on the application. The proposal, which was presented to the Texas Natural Resource Conservation Commission (TNRCC) on July 7, recommends that the TNRCC deny the application due to the insufficiency of information regarding two of the major contested issues evaluated by the judges. The two issues are "characteriz[ation of] the fault directly beneath the site" and the "potential negative socioeconomic impacts from the proposed facility." In other respects, the judges agreed with the Authority, finding that

- "[t]here is a need for the facility,"
- "[n]o preferable alternatives to the proposed facility have been established," and
- the Authority "provided reasonably persuasive evidence supporting its contentions" on fourteen additional categories of subject matter that the TNRCC must consider.

The judges also found that—if the draft license issued by the TNRCC is modified to clarify that the facility could accept waste containing a total of no more than 1 million curies of radioactivity during the 20-year license term—"the performance assessment, including the consideration of non-radiological impacts and accident scenarios, is adequate."

Although the judges recommended denial of the Authority's application, they explicitly recognized that "the regulatory framework relating to this unique application ultimately calls for substantial use of informed discretion in making and weighing a variety of often subjective determinations. These numerous factors rationally could be evaluated to reach a different conclusion."

continued on page 12

In This Issue

Low-Level Radioactive Waste Forum

LLW Notes
Volume 13, Number 6 • June/July 1998
Editor, Cynthia Norris; Associate Editor, Holmes Brown
Contributing Writers: Cynthia Norris, Rick Gedden, Todd Lovinger, Laura Scheele, M. A. Shaker
Materials and Publications: Rick Gedden • Legal Research: Joel Weiss
Layout and Design: M. A. Shaker

LLW Notes is distributed by Afton Associates, Inc. to Low-Level Radioactive Waste Forum Participants and other state and compact officials identified by those Participants to receive *LLW Notes.*

Determinations on which federal officials receive *LLW Notes* are made by Afton Associates based on LLW Forum Executive Committee guidelines in consultation with key federal officials. Specific distribution limits for *LLW Notes* are established by the Executive Committee.

To assist in further distribution, all documents included in LLW Forum mailings are listed in *LLW Notes* with information on how to obtain them.

Recipients may reproduce and distribute *LLW Notes* as they see fit, but articles in *LLW Notes* must be reproduced in their entirety and with full attribution.

The Low-Level Radioactive Waste Forum is an association of state and compact representatives, appointed by governors and compact commissions, established to facilitate state and compact implementation of the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985 and to promote the objectives of low-level radioactive waste regional compacts. The LLW Forum provides an opportunity for state and compact officials to share information with one another and to exchange views with officials of federal agencies and other interested parties.

Table of Contents

LLW FORUM

Low-Level Radioactive Waste Forum
c/o Afton Associates, Inc.
403 East Capitol Street
Washington, DC 20003

VOICE **(202)547-2620**
FAX **(202)547-1668**
E-MAIL **llwforum@afton.com**
INTERNET **http://www.afton.com/llwforum**

Key to Abbreviations

U.S. Department of Energy	DOE
U.S. Department of Transportation	DOT
U.S. Environmental Protection Agency	EPA
U.S. General Accounting Office	GAO
U.S. Nuclear Regulatory Commission	NRC
naturally-occurring and accelerator-produced radioactive materials	NARM
naturally-occurring radioactive materials	NORM
Code of Federal Regulations	CFR

Prepared by Afton Associates, Inc. for the LLW Forum under State of Washington Department of Ecology Contract Number C9700071 through a grant from the U.S. Department of Energy.

Appalachian Compact/Pennsylvania

Appalachian Compact Will Support Pennsylvania's Decision re Siting Process

At a meeting of the Appalachian States Low-Level Radioactive Waste Commission on June 18, the commission voted to "support the [Pennsylvania Department of Environmental Protection's] suspension of the Siting Process" for a disposal facility if the department chooses to do so. In such an event, the commission indicated that it "fully anticipates that the Department will resolve the Siting Contract [with Chem-Nuclear] in such a manner as to assure the resumption of the Siting Process on an expeditious and economical basis if the need arises or if the availability of a LLRW disposal site ceases for any reason." The commission commented that, under the current circumstances, a suspension "would not violate the Commonwealth's obligation under the Federal and State Compact Acts to cause a Regional Facility to be sited and developed on a timely basis."

As of press time, the Pennsylvania Department of Environmental Protection (PADEP) has not formally suspended the siting process.

Administration and Finances In a separate vote at the compact meeting, the commission decided that its best interests would be served by closing its administrative offices and transferring all operational authority to the Chair at the end of the year if the siting process has been suspended. To prepare for this possibility, the commission adopted a budget for the six-month period from July 1 through December 31, 1998, and a separate twelve-month budget for 1999. If the office is closed, the Chair has been authorized to serve as Executive Director on a temporary basis.

Special Meeting The commission also voted to hold a special meeting in December 1998 to hear a report from Pennsylvania about its efforts to suspend the siting process and its negotiations with Chem-Nuclear, and to reconsider the budgets if necessary.

Other Business In other action, the commission

- resolved not to designate Maryland as a host state, irrespective of a large one-time environmental remediation project that might otherwise have triggered such a designation;
- authorized the Chair to sign the Interstate Agreement for the Uniform Application of Manifesting Procedures (see *LLW Notes*, May 1998, p. 3); and
- reelected James Seif, PADEP Secretary, as Chair.

Background Prior to the meeting, Seif had announced in a press release that Pennsylvania would "explore the possibility of suspending its search" for a disposal site. Seif said that the primary factor leading to the possible suspension was the amount of disposal capacity available to Pennsylvania generators at Chem-Nuclear's facility in Barnwell, South Carolina.

—CN

For further information, contact Marc Tenan of the Appalachian Commission at (717)234-6295 or Richard Janati of PADEP at (717)787-2163.

Northwest Compact/Washington

Northwest Compact Begins Scheduled Review of Access Policy for LLRW Disposal at Envirocare

On June 23, during a meeting of the Northwest Interstate Compact on Low-Level Radioactive Waste Management, the compact committee initiated a review of its policy concerning access to the radioactive waste disposal facility operated within the compact region by Envirocare of Utah. Such a review is called for every three years under the committee's amended resolution and order of April 1995. (See box.)

The compact committee hopes to complete its review at its next meeting, scheduled for November 9, 1998 in Salt Lake City, Utah, although a second meeting may be scheduled in early 1999 if there are any outstanding issues. At the end of the review process, the State of Utah, Envirocare, and the committee will consider development of a fact sheet clearly describing the low-level radioactive waste streams that are allowed access to the region for disposal at Envirocare.

Work Group In the interim, the committee has established a work group to examine issues related to the policy. Members of the work group are

- William Sinclair, compact committee member for Utah, Director of the Utah Division of Radiation Control, and Executive Secretary of the Utah Radiation Control Board;
- David Stewart-Smith, compact committee member for Oregon and Administrator of the Energy Resources Division in the Oregon Office of Energy;
- Michael Garner, Executive Director of the Northwest Compact; and
- Lilia Lopez, compact counsel and Assistant Attorney General for the State of Washington.

The work group will study whether the circumstances leading to adoption of the amended resolution and order have changed significantly and, if so, how. It will also develop an issue paper discussing the benefits and detriments of various policy options. To assist the compact committee in reaching a decision, the work group may survey affected parties including representatives of states and compacts.

Process for Considering Changes If it appears that a change in compact policy is warranted, a revision will be drafted and circulated in advance of any committee action. The committee may also discuss the policy in a conference call meeting prior to its scheduled November meeting.

Prior Action re Policy Shortly before the compact committee's June meeting, both the committee and the State of Oregon submitted comments to the State of Utah that referenced the committee's access policy for Envirocare. (See related story, page 6.)

The compact committee also addressed the issue of access at its March 10 meeting, at which a representative of the State of Connecticut sought an exemption to allow shipment to Envirocare of certain waste that did not meet the volume criteria in the compact's resolution and order. It was noted at the meeting that, while the waste had originally been thought to be NORM, characterization subsequently revealed that it was low-level radioactive waste. After deliberation, the committee adopted a motion stating that, to the extent that the material is determined to be low-level radioactive waste, it is denied access for disposal at Envirocare.

—CN

For further information, contact Michael Garner of the Northwest Compact Committee at (360)407-7102.

Northwest Interstate Compact • Amended Resolution and Order • April 20, 1995

WHEREAS, the Envirocare of Utah, Inc. facility in Clive, Utah, serves an important national purpose in accepting for storage and disposal bulk, large volume media slightly contaminated with very low concentrations of radioactivity;

WHEREAS, accepting for storage and disposal, low-level radioactive waste other than bulk large volume media slightly contaminated with very low concentrations of radioactivity may have adverse implications for the national process under PL 99-240;

WHEREAS, no facility located in any party state may accept low-level waste generated outside of the region comprised of the party states except as may be agreed to under Articles IV and V of the Compact statute;

WHEREAS, the State of Utah has licensed Envirocare of Utah, Inc. as a low-level radioactive waste disposal facility; and

WHEREAS, the Compact Committee has been asked by the State of Utah to allow access to Envirocare of Utah, Inc. for certain low-level radioactive wastes;

BE IT HEREBY RESOLVED AND ORDERED THAT:

1. Low-level radioactive mixed waste, as defined in federal and/or state law is allowed access to the licensed Envirocare of Utah, Inc. facility in the Northwest Interstate Compact region.

2. Large volume, soil or soil like materials or debris slightly contaminated with low-level radioactive waste (as defined in PL 99-240 and as allowed under the radioactive materials license of Envirocare of Utah, Inc.) as determined by the State of Utah is allowed access to the licensed Envirocare of Utah, Inc. facility in the Northwest Interstate Compact region.

3. While the Compact allows the above described wastes access to the licensed Envirocare of Utah, Inc. facility in the Northwest Interstate Compact region, in accordance with Article V of the Compact, Utah retains the right to specifically approve each disposal arrangement before the waste is allowed access to the licensed Envirocare of Utah, Inc. facility.

4. All federal and State environmental and other laws and regulations shall be complied with by the licensed Envirocare of Utah, Inc. facility accepting the above-referenced media or waste for treatment, storage, or disposal. The Compact has no authority and assumes no responsibility for the licensing and operation of the Envirocare of Utah, Inc. facility.

5. It is the intent of the Committee that only those wastes approved by the compact of origin (including the Northwest Compact) be allowed. For states unaffiliated with a compact, state approval for export is required to the extent states can exercise such approval. This Resolution and Order shall constitute an arrangement under Article V of the Compact statute with any unaffiliated state or compact that approves waste for export to the Envirocare of Utah, Inc. facility.

6. The licensed Envirocare of Utah, Inc. facility accepting any of the above described low-level radioactive wastes shall provide monthly to the Compact Executive Director a record of all shipments to include generator name, state of generation, the kind of waste, waste form, total waste volume, and average concentration for each such shipment.

7. The Northwest Interstate Compact retains the right to modify or rescind this authorization at any time. The Compact Executive Director shall monitor the progress of other compacts and states in siting low-level radioactive waste disposal facilities under PL 99-240. At three year intervals, the Compact Committee shall evaluate such progress with regard to access to the Envirocare of Utah, Inc. facility.

Northwest Compact/Washington (continued)

Northwest Compact, Oregon Comment on Draft Radioactive Material License for Envirocare

Both the Northwest Interstate Compact on Low-Level Radioactive Waste Management and the State of Oregon have submitted comments to the Utah Radiation Control Board concerning the draft radioactive material license and draft Safety Evaluation Report (SER) prepared by Utah regulators for the disposal facility operated by Envirocare of Utah. Oregon and Utah are members of the Northwest Compact.

Utah regulators issued the draft license and SER in April. (See *LLW Notes*, May 1998, p. 26.) Public comments were accepted on the documents from April 14 through June 15, 1998.

Excerpts from the Northwest Compact's and Oregon's comments follow.

—CN

Northwest Compact

Submitted by Jeff Breckel, Northwest Compact Chair, on June 15, 1998.

> The Northwest Compact committee would like to offer several comments on matters that raise policy concerns associated with the Committee's April 20, 1995 Amended Resolution and Order.
>
> The intent of the Compact's original Resolution and Order was to provide disposal capacity for large volume, low activity bulk decommissioning and cleanup low-level wastes that developing sites are not being designed to accept. Over the years, the Compact has reiterated this position, however, the proposed conditions in Envirocare's draft license appear to go beyond the intent of the current Amended Resolution and Order.
>
> The draft license increases significantly the concentration of radioisotopes allowed for disposal. In fact, some have been increased by factors up to several million … In addition, the proposed license allows these concentrations to be averaged over the entire waste container, rather than being a maximum concentration in the waste as is currently the case. These proposed changes would appear to provide acceptance of a much broader range of low-level wastes than the current license.
>
> The draft license describes the chemical and physical waste forms that may be accepted as "Large volume, bulky soil or soil-like materials or debris". The term "large volume" is not defined and the reference to "bulk" has been removed from other sections … of the draft license. Although the Committee has had a general understanding with Envirocare that "large volume" means 1,000 cubic feet from an individual generator, there have been interpretation problems connected with this term. Is it 1,000 cubic feet per shipment or does it allow for shipments over a period of one year or longer? Must it include 1,000 cubic feet from an individual generator or can a processor/broker consolidate waste from multiple generators to achieve the 1,000 cubic foot minimum? The draft license broadly defines "debris" as radioactive waste other than soils. The Committee has voiced its concern that this definition of "debris" could allow acceptance of any type of low-level waste that meets the radioisotope concentration limits.

The increase in the radioisotope concentrations and the lack of descriptive definitions for "large volume" and "debris" does not appear to be consistent with the intent of the Amended Resolution and Order. This could make it difficult for the Committee to continue to rely on the license to appropriately limit the disposal of out-of-region low-level wastes at Envirocare. The State of Utah could address these issues by either providing more descriptive definitions of the terms "large volume" and "debris" within the license or by simply establishing license conditions that prohibit disposal of certain types of wastes streams such as routinely generated operational and processing low-level waste.

The Northwest Compact's principal concern is the long-term health of the national siting process as established by the Low-Level Radioactive Waste Policy Amendments Act. We acknowledge Envirocare's compliance with the amended Resolution and Order requirement that no low-level wastes will be accepted without the authorization of the compact in which the waste was generated. However, if Envirocare is able to accept significant volumes of routinely generated low-level waste from other compact regions, there would be little incentive for these compacts to move ahead with development of their own disposal capacity.

Oregon

Submitted by David Stewart-Smith, compact committee member for Oregon and Administrator of the Energy Resources Division in the Oregon Office of Energy, on May 19, 1998.

The Safety Analysis Report appears to be thorough. There are matters addressed in the SER [Safety Evaluation Report], however, that I find of concern. Here are several examples:

- The SER evaluates the disposal of Class B and C wastes. Even though the draft license makes it clear that such wastes cannot be disposed at the site without further state approvals, it appears to set the stage for Class B and C waste disposal in the future.

- The SER lists waste characteristics that must be complied with … Listed is a requirement that gaseous wastes be packaged at pressures not exceeding 1.5 atmospheres at 20 degrees Centigrade. The license prohibits the disposal of any waste containing toxic gases capable of causing harm in the process of handling or disposal … Disposal of a pressurized container of radioactive gas could present such a risk.

- Wastes containing biological or infectious material must be treated to reduce the potential hazard. But the waste form allowed for disposal in the license specifies soil, soil-like material or debris. Animal carcasses do not intuitively meet the definition of debris.

- If wastes other than soil and soil-like materials are to be disposed of in the Envirocare facility, site design criteria requiring compaction to 90% of standard proctor [a measure of compaction] seems difficult to confirm. To my knowledge, optimum moisture content for materials other than soils or soil-like materials is not defined in any accepted engineering practice or procedure …

With the [Northwest Compact's] Current Resolution and Order under review for modification prior to readoption, I will consider these proposed changes to the Envirocare license carefully. I would like to work with you to discuss and resolve my concerns before readoption of the Resolution and Order. I hope we can reach agreement on matters concerning national Low Level Waste policy.

See related story, p. 17.

Southwestern Compact/California

Interior Department Ceases Consideration of California's Request to Purchase Ward Valley

Rescinds Eviction Notice to Ward Valley Protesters

On May 29, the U.S. Interior Department (DOI) suspended work on the processing of a request by the California Department of Health Services (DHS) to purchase federal land in Ward Valley for use in siting a low-level radioactive waste disposal facility, pending further guidance on the issue of DHS' authority to purchase the land. The work suspension was announced in an internal memorandum from Nina Rose Hartfield, Deputy Director of the U.S. Bureau of Land Management (BLM), to Ed Hastey, Director of the California BLM Office. The memorandum directed BLM to cease any action on the processing of DHS' direct sale request that "entails the commitment of substantial amounts of time or money." It also stated that work on the supplemental environmental impact statement will continue "only to the extent of completing discrete actions already begun by the contractor which would be more difficult and costly to complete if interrupted, and no further action will be taken in connection with the proposed on-site testing." (The complete text of the memorandum can be found on page 11.)

Shortly thereafter, on June 5, the Interior Department rescinded an eviction notice requiring Ward Valley protesters to relocate to an area adjacent to the site. The eviction notice was originally issued on February 14, 1998, to allow for studies on rainfall infiltration and on the presence of tritium and other substances. According to a January 29 *Federal Register* notice, the site was being closed in order to ensure that "drilling and related activities to be undertaken by the Department of the Interior and the California Department of Health Services ... are carried out under conditions which will ensure public safety, promote site security, and provide for integrity of the sampling activities." (See *LLW Notes*, March 1998, pp. 6–7.)

Basis for Suspension of Work: Letter from Three California State Legislators

In the memorandum, Hartfield attributed BLM's decision to cease work on Ward Valley to an April 14 letter that was sent by three Democratic members of the California State Legislature to U.S. Interior Secretary Bruce Babbitt. The letter complained that the procedure employed by DHS to attempt to purchase Ward Valley "appears to be illegal, and may be specifically designed to circumvent the California State Legislature." In the letter, the legislators claimed that a recent legislative staff review of the land acquisition process revealed that DHS has no authority to purchase the land and no legitimate source of funds with which to do so. The letter was signed by John Burton, President Pro Tempore of the California State Senate; Antonio Villaraigosa, Speaker of the California State Assembly; and Sheila Kuehl, Speaker Pro Tempore of the California State Assembly. The Interior Department transmitted the letter to DHS which, shortly thereafter, provided a written response denying the legislators' allegations and affirmatively claiming authority to receive the land. (See *LLW Notes*, May 1998, pp. 6–8.)

California Department of General Services Finds DHS Has Authority to Acquire Ward Valley

In response to the legislators' allegations concerning DHS' authority, DHS staff asked the California Department of General Services (DGS) to provide its view on the issue. DGS is the department that the legislators allege is vested with authority to hold title to public lands under California statute. In an April 30 letter to DHS Director S. Kimberly Belshé, DGS Director Peter Stamison responded as follows:

> As you are probably aware, DGS has a long history of involvement in the Ward Valley project, is fully aware of the authority granted to DHS for the acquisition of the Ward Valley site, and of the important public purpose served by the transfer of the Ward Valley site from federal to state ownership. We believe that DHS had the authority to acquire the land under Health and Safety Code section 100220. In any event, if the Ward Valley site were to be transferred to the State and DGS approval is required, DGS would approve the transfer. Indeed, by its past actions, DGS has already demonstrated its approval.

DHS staff had also inquired about DGS' view on the U.S. Department of Justice's attempt to raise the issue of land acquisition authority in recent lawsuits. (See next section.) Stamison's letter responds to the DHS question as follows:

> It is our understanding that DHS is seeking a grant of the Ward Valley land pursuant to the authority set forth in Health and Safety Code section 100220. The involvement of DGS in this transfer would only be necessary on the assumption that this section does not also authorize DHS to hold title once the patent is received. Assuming that DHS could not hold the title, DGS would approve the transfer and hold patent and title. DGS would then transfer control and possession of the site to DHS as authorized by Government Code section 14673.

Consideration of the Issue by the U.S. Court of Federal Claims and the U.S. District Court

U.S. Court of Federal Claims The issue of DHS' authority to purchase Ward Valley from DOI was recently raised in related lawsuits filed in the U.S. Court of Federal Claims by US Ecology and DHS against the United States of America. The suits allege that DOI breached a contract to sell federal land in Ward Valley, California, to the state and request reimbursement for past costs, lost future profits, and lost opportunity costs. In April, the federal defendants in these actions filed a motion with the court requesting additional briefing on the issue of California's authority to enter into a contract with DOI to purchase Ward Valley. The court denied the motion on May 8, stating as follows:

> The threshold issues in this case are whether the previous Secretary of Interior was authorized to contract on behalf of the Untied States, and whether he took all of the steps necessary to create a contract. The issue of authority on the part of the State of California is not properly before this court at this time. It is not clear what basis we would have for making a determination under state law whether the Governor was authorized to act; we must proceed on the assumption that he was.

In response to the defendants' filing of a motion for reconsideration, however, the court later reversed its ruling and directed the parties to submit briefs on the issue of California's authority to purchase the land. Accordingly, DHS and the federal defendants filed briefs in May of 1998.

U.S. District Court The issue of DHS' authority was also recently raised at a hearing in related lawsuits filed in the U.S. District Court for the District of Columbia by US Ecology and DHS. (See related story, this issue.) The actions are similar to those before the U.S. Court of Federal Claims, but ask for a different form of relief. Specifically, the district court actions seek an order compelling transfer of the Ward Valley site and issuance of a patent, whereas the federal claims court actions seek financial relief. The plaintiffs were forced to proceed in two separate courts because neither court has authority to grant all of the relief requested.

continued on page 10

Southwestern Compact/California (continued)

Background Information

Direct Land Sale Request The State of California first applied to BLM for transfer of the Ward Valley land in 1987. An application was submitted by the State Lands Commission on behalf of DHS requesting that the federal property be exchanged for state lands, as provided for under an administrative process known as indemnity selection. The application was renewed in 1990, but the state subsequently requested that it be suspended. In August 1992, the application was rejected due to a "gross disparity" between the value of the federal lands and the proposed substitutes. However, in July 1992, DHS had submitted a separate application to BLM requesting direct sale of the land. (See *LLW Notes*, August/September 1992, p. 13.) Then-Interior Secretary Manuel Lujan announced his intention to approve the direct sale request in January 1993, but the transfer was subsequently rescinded by incoming Interior Secretary Bruce Babbitt.

Supplemental Environmental Impact Statement In October 1995, then-Deputy Interior Secretary John Garamendi rejected a proposed agreement for the transfer of Ward Valley to the State of California because it limited DOI's ability to oversee the state's regulation of the facility. (See *LLW Notes*, October 1995, pp. 14–16.) Garamendi then announced in February 1996 that the U.S. Bureau of Land Management would prepare a second Supplemental Environmental Impact Statement (SEIS) to establish the safety of the site. (See *LLW Notes*, March 1996, pp. 14–18.) Among the stated justifications for the SEIS were reports prepared by the U.S. Geological Survey about the low-level radioactive waste disposal facility in Beatty, Nevada, even though DOI had previously concluded that the reports were "too inconclusive to be relevant" to the Ward Valley site. The SEIS was expected to take one year to complete.

Tritium Testing Also in February 1996, Garamendi announced that DOI would conduct further testing at the Ward Valley site—including tritium migration tests—in accordance with the department's interpretation of recommendations from a 1995 National Academy of Sciences' report on Ward Valley. (See *LLW Notes Supplement*, June 1995, pp. 8–12.) The State of California also planned to conduct similar tests. DOI and DHS therefore attempted to reach an agreement to conduct joint testing at the site, but no agreement was ever reached. In January 1998, DOI announced its approval of a DHS permit to conduct a study of rain infiltration at the site, but declared that DHS testing could not proceed until DOI completed its own tests. (See *LLW Notes*, March 1998, pp. 8–9.) To date, DOI has not performed its Ward Valley site tests.

—TDL

NAS Project re Impacts of LLRW Policy on Biomedical Research

The National Research Council's Board on Radiation Effects Research in collaboration with the Board on Radioactive Waste Management and the Division of Health Sciences Policy in the Institute of Medicine is proposing a project to assess and document the impact that the current low-level radioactive waste policy has on biomedical research, particularly in universities and medical centers.

—RTG

For further information, contact Evan Douple, Director, Board on Radiation Effects Research, National Academy of Sciences/National Research Council at (202)334-2836 or by e-mail at edouple@nas.edu.

Internal Memorandum re Suspension of Work on Ward Valley

The following is the complete text of an internal Bureau of Land Management memorandum directing, among other things, the suspension of work on the California Department of Health Service's request to purchase Ward Valley for use in siting a low-level radioactive waste disposal facility.

To: Ed Hastey, State Director, California

From: Nina Rose Hartfield, Deputy Director, Bureau of Land Management

Subject: Ward Valley Actions

This memorandum provides direction on actions regarding the continued processing of the request from the California Department of Health Services (CDHS) to purchase by direct sale federal land at Ward Valley, and actions regarding the protesters at the Ward Valley site.

As you are aware, several members of the California Legislature wrote a letter to Interior last month asserting that CDHS is without authority to purchase the Ward Valley land from BLM. Interior's Solicitor requested and received from CDHS a response to the issue raised in the legislators' letter. The U.S. Department of Justice (Justice) has considered the issue in the context of pending litigation in which CDHS and US Ecology allege that a contract and a duty to convey the land already exist. Justice has recently put before the courts its view that CDHS has not had the authority to contract for the purchase of the land or to acquire the land on behalf of the State. The Interior Solicitor's Office, in consultation with Justice, has reached the same conclusion with respect to CDHS' current request to purchase the land—that is, that CDHS lacks authority and is ineligible to purchase the land.

Continued processing of the sale request to meet the requirements of the Federal Land Policy and Management Act and the National Environmental Policy Act will entail the expenditure of substantial amounts of money and time by BLM. If the conclusion regarding CDHS' authority is correct, these resources will likely have been wasted. Therefore, pending further guidance on the issue of CDHS' authority, BLM will take no further action which entails the commitment of substantial amounts of time or money to continue to process CDHS' direct sale request. Work will continue of the supplemental environmental impact statement only to the extent of completing discrete actions already begun by the contractor which would be more difficult and costly to complete if interrupted, and no further action will be taken in connection with the proposed on-site testing.

We expect that this course of action will resolve any outstanding issues regarding activities at the site. Please let us know if we need to consult further about site management while we await further guidance on the authority question.

cc: Kevin Gover [Assistant Secretary for Indian Affairs, U.S. Department of the Interior]

Texas Compact/Texas (continued)

Background

The evidentiary hearings, which were conducted by judges from the Texas State Office of Administrative Hearings, began on January 21 and ended on March 25. (See *LLW Notes*, February 1998, p. 8.) Seven groups were parties to the hearings, including the Authority; the Executive Director of the TNRCC, represented by staff attorneys supporting the license; other proponents of the license; the Public Interest Counsel of the TNRCC, represented by attorneys opposing the license; and three groups of protestants opposing the license. (See *LLW Notes*, December 1996, pp. 1, 3–5.) Parties filed final written arguments on April 28, and replies to final arguments were filed May 22.

Next Steps

If any party to the hearings objects to the judges' proposal, that party may file written objections by July 27. A spokesman for the Authority has indicated that the Authority plans to do so and will dispute the judges' findings in the two areas where the license application was deemed inadequate.

The three Commissioners on the TNRCC will evaluate the judges' proposal and any objections and any replies to the objections during a public meeting. The commission may then

- issue a final decision and order either granting or denying the license application; or
- remand the application to the judges and instruct the Authority to perform further studies in the areas where the application was found lacking.

A final decision and order of the TNRCC may be appealed to the state district court in Travis County by any party to the hearings.

—CN

For further information, contact Lee Mathews of the Texas Authority at (512)451-5292. The judges' recommendation is posted on the Internet at
http://www.soah.state.tx.us/pfds.html.

The preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, via facsimile transmission in a News Flash on July 7, 1998.

Midwest Compact

Midwest Compact Changes Staffing, Office Location

On June 17, the Midwest Interstate Low-Level Radioactive Waste Commission met and resolved a number of issues concerning the commission's office and staff.

New Executive Director The commission agreed to contract with the State of Wisconsin for the services of Stanley York, the commission Chair, who will be serving as Executive Director on a part-time basis. York, who represents Wisconsin on the commission, has been Chair since 1997. He is an attorney and an ordained minister who has worked in the office of the Governor of Wisconsin, served three years as a Wisconsin state legislator, and, most recently, held the position of Director of the Winnebago Mental Health Institute. York replaces Gregg Larson, who announced his resignation in March. (See *LLW Notes*, March 1998, p. 11.)

In keeping with the decision to contract with York, the commission reelected York, as well as Vice Chair Joseph Esker of Minnesota. The commission also amended its bylaws to extend the terms of the Chair and Vice Chair from one year to two, and to remove restrictions on the number of terms served.

Office Move The commission's new address is

Attn.: Susan Hagstrom — phone: (608)267-4793
1414 E. Washington Ave. — fax: (608)267-4799
P.O. Box 309
Madison, WI 53701-0309

Other Action The commission also amended its bylaws so as to require a minimum of one meeting per year instead of four.

—CN

For further information, contact Stanley York of the Midwest Commission at (608)831-5434.

Texas Parties' Positions on Contested Issues

The following are excerpts from the executive summary of the administrative law judges' Proposal for Decision. The excerpts summarize the arguments of the Texas Authority (the "Applicant"), the proponents, the Executive Director (ED) of the TNRCC, the protestants, and the Public Interest Counsel (PIC) of the TNRCC—and state the recommendations of the administrative law judges (ALJs).

Site suitability, geological, hydrological, and meteorological factors, and natural hazards

Applicant, Proponents, ED: The site is appropriate … Based on an NRC definition identifying faults realistically capable of damaging movement, the inferred fault under the site is not "capable," not having moved for more than 780,000 years … The facility could withstand a reasonable worst-case earthquake and poses no threat to groundwater. The site is otherwise suitable.

Protestants & PIC: The fault directly beneath the site has not been adequately characterized. The data are inadequate to show that the fault has not moved in geologically recent times, and basic features such as its length and trend are unknown. Other geological, hydrological, and meteorological information were also inadequate.

ALJs' Recommendation: The fault beneath the site has not been adequately characterized to determine whether it is connected with a capable fault off-site. The Applicant has also failed to adequately characterize the basic properties of this fault.

Land use compatibility and socioeconomic effects

Applicant & Proponents: The facility would be compatible with the predominantly agricultural use of surrounding land. The socioeconomic impact of the facility is a relatively insignificant issue; in any event, the facility would have a positive socioeconomic impact due to creation of local jobs and a host fee paid to Hudspeth County.

ED: Disagrees with Applicant's characterization of the issue of socioeconomic impacts as "relatively insignificant"; nonetheless, concurs with Applicant that the overall socioeconomic impact from the facility probably would be positive.

Protestants & PIC: The facility would constitute a land use incompatible with the surrounding area and would have detrimental socioeconomic impacts on the region. Business development and tourism would suffer and property values would decline. The Applicant failed to analyze these and other "special impacts" and unduly confined the analysis it did perform to Hudspeth and Culberson Counties. Environmental justice concerns have not been adequately addressed.

ALJs' Recommendation: The Applicant has failed to adequately address potential local and regional socioeconomic impacts such as economic growth that might be foregone, adverse impacts on tourism, and social impacts such as those related to perceptions of unfairness in the siting process or perceived changes in the quality of life in the area. The evidentiary record raises these issues as serious concerns but provides no avenue for meaningfully analyzing them.

Need and alternatives

Applicant, Proponents, & ED: The Legislature has determined that the facility is needed as a matter of law. There is also an objective need for the facility, because the only existing facility that can accept most low-level waste cannot reasonably be relied upon to meet long-term disposal needs. Alternatives such as above-ground storage and other disposal technologies compare unfavorably to the proposed facility.

Protestants & PIC: The Commission must consider the existence of need for the facility, which has not been statutorily or objectively established. The proposed facility would use technology similar to that of other below-ground disposal facilities, all of which have leaked. Another technology, such as "assured storage," should be used.

ALJs' Recommendation: There is a need for the facility, in that the only other facility currently available to dispose of much of the projected waste stream cannot be relied upon to meet long-term disposal needs. No preferable alternatives to the proposed facility have been established.

Central Compact/Nebraska

Funding Extended for Central Compact Facility

At the annual meeting of the Central Interstate Low-Level Radioactive Waste Commission, held on June 17, the commission ratified a number of decisions made previously during telephone meetings.

Among these decisions was the extension until January 31, 1999, of the commission's latest funding agreement with the major regional generators. This funding commitment agreement is for an additional $6.1 million. To date, generators have provided $83.8 million toward facility development. The generators' total prelicensing commitment is $90.7 million.

The commission also ratified an amendment to its contract with facility developer US Ecology to adjust the company's rate of return on its financial contribution to the project. Under the amended contract, US Ecology will receive interest at the prime rate plus 2 percent until the commencement of facility operation.

In other action, the commission approved a reduced budget for FY 1998. As a result, one staff position has been eliminated, and another cut back to part time. These adjustments reflect a change in the commission's priorities now that the licensing process for the compact's regional disposal facility has reached an advanced stage. (See *LLW Notes*, May 1998, p. 25.) The commission also reelected Laura Mack Gilson of Arkansas as Chair and lowered the waste export application fees for generators who have commission permission to export from the region.

—CN

For further information, contact A. Eugene Crump of the Central Commission at (402)476-8247 or acrump@cillrwcc.org.

Southeast Compact/North Carolina

NC House Committee Votes to End Authority Funding

On July 1, the Committee on Commerce in the North Carolina House of Representatives voted favorably on a bill that would stop all funding for the North Carolina Low-Level Radioactive Waste Management Authority. The bill, H.B. 1707, is entitled, "An Act to Eliminate State Funding Related to Siting a Low-Level Radioactive Waste Facility in North Carolina."

Citing concerns about the "future viability of the interstate compact system," the legislation provides that all funds appropriated to the Authority that have not already been spent or otherwise committed shall revert to the General Fund. The bill would also prohibit other state agencies from supporting the Authority's activities, performing any work related to siting a low-level radioactive waste disposal facility, or reviewing the license application for such a facility.

A spokesman for the Authority expressed disappointment with the Commerce Committee's action, but noted that some key legislators on the committee, including its Chair, represent districts in the vicinity of the proposed disposal site.

Next Step The legislation must next proceed to the House Appropriations Committee, where its prospects are uncertain.

Senate Bill A companion bill, S.B. 1572, has been introduced in the Senate, but as of press time the Senate has not acted on it.

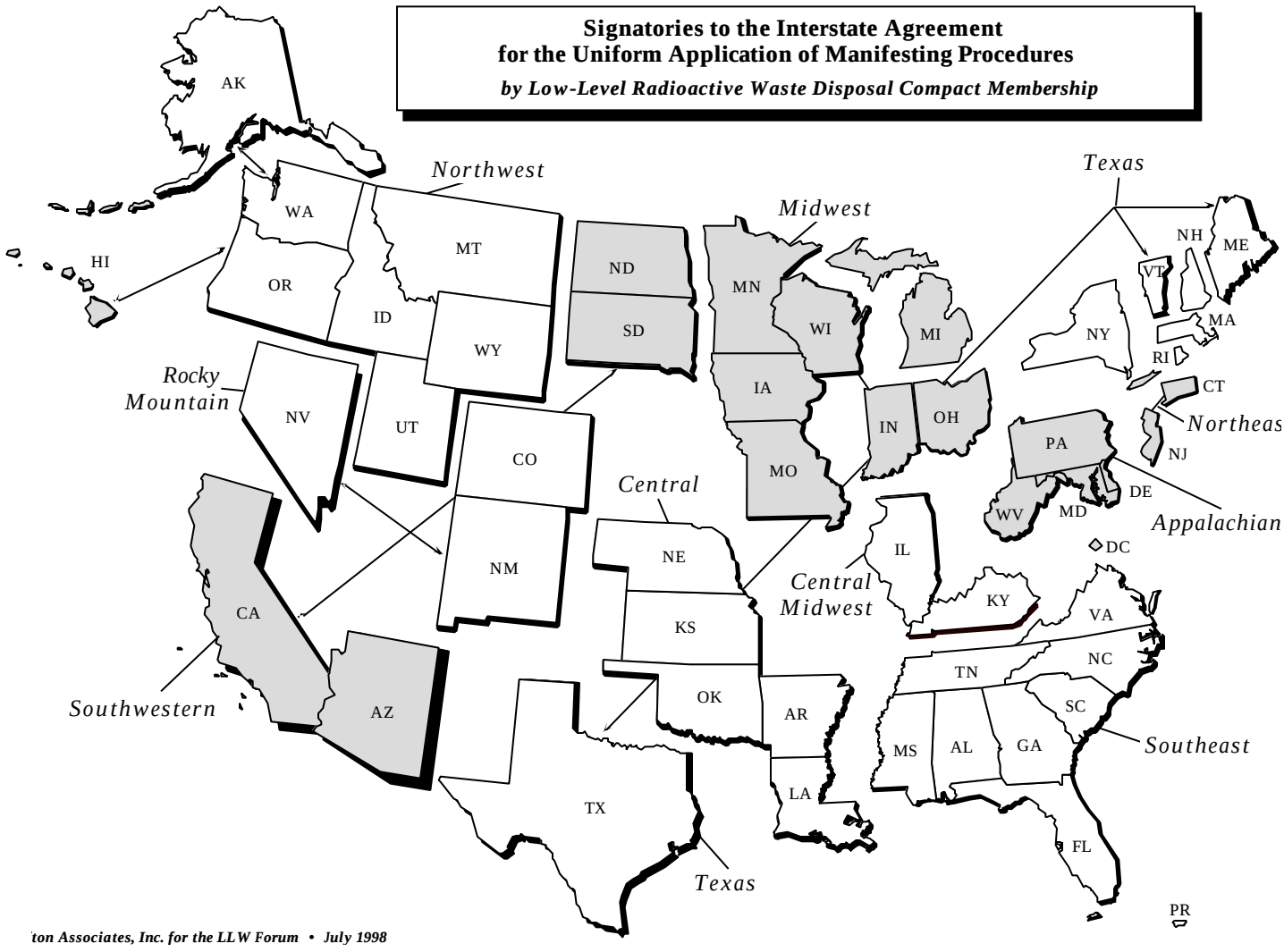
Current Funding Authority funding for FY 1998-99, which began July 1, was appropriated last year as part of the state's two-year budget cycle. Such appropriations, however, are typically adjusted during the off years.

—CN

For further information, contact Andrew James of the Authority at (919)733-0682. Copies of the legislation are available on the North Carolina General Assembly's web site at http://www.ncga.state.nc.us/

State and Compact Events

July	Event	Location/Contact
Central Compact/ Nebraska	Central Interstate Low-Level Radioactive Waste Commission special telephone meeting to take action on low-level radioactive waste export applications	Lincoln, NE Contact: A. Eugene Crump (402)476-8247 or by e-mail at acrump@cill-rwcc.org
Massachusetts	Massachusetts Low-Level Radioactive Waste Management Board's Budget and Planning Committee and Assessment Committee meetings	Acton, MA Contact: Carol Amick (617)727-6018
August	**Event**	**Location/Contact**
Central Compact/ Nebraska	Central Interstate Low-Level Radioactive Waste Commission Facility Review Committee meeting	Lincoln, NE Contact: A. Eugene Crump
Rocky Mountain Compact	Rocky Mountain Low-Level Radioactive Waste Board regular meeting	Denver, CO Contact: Tracie Archibold (303)825-1912
September	**Event**	**Location/Contact**
Appalachian Compact/ Pennsylvania	Pennsylvania Low-Level Radioactive Waste Advisory Committee meeting	Harrisburg, PA Contact: Richard Janati (717)787-2163
Northeast Compact/ Connecticut/ New Jersey	Northeast Compact Low-Level Radioactive Waste Commission meeting	Saddlebrook, NJ Contact: Janice Deshais (860)633-2060
	Connecticut Hazardous Waste Management Service Board of Directors regular meeting	Hartford, CT Contact: Ronald Gingerich (860)244-2007
	Connecticut Low-Level Radioactive Waste Advisory Committee regular meeting	Hartford, CT Contact: Ronald Gingerich
Massachusetts	Massachusetts Low-Level Radioactive Waste Management Board meeting	Boston, MA Contact: Carol Amick (617)727-6018



Signatories • Interstate Agreement for the Uniform Application of Manifesting Procedures • 7/98

entity	*signed*	*signatory*
Appalachian States Low-Level Radioactive Waste Commission	approved at meeting on June 18, 1998	
Midwest Interstate Low-Level Radioactive Waste Commission	April 9, 1998	Stanley York, Chair
Northeast Interstate Low-Level Radioactive Waste Commission	June 9, 1998	Kevin McCarthy, Chair
Southwestern Low-Level Radioactive Waste Commission	June 5, 1998	Dana Mount, Chair
State of Michigan	April 1, 1998	Dennis Schornack, Commissioner of the Michigan Low-Level Radioactive Waste Authority

Rocky Mountain Compact

On June 1, 1998, the Rocky Mountain Low-Level Radioactive Waste Board adopted an amendment to the board's rules. The change clarifies that NORM waste from oil and gas production within the Rocky Mountain Compact region may be placed in oil and gas wells without the board's designating such wells as regional facilities. The board's action followed a public hearing on the matter. (See *LLW Notes*, May 1998. p. 13.)

—CN

For further information, contact Leonard Slosky of the Rocky Mountain Board at (303) 825-1912.

Northwest Compact/Washington

On July 13, the Utah Department of Environmental Quality (DEQ) announced that public notice proceedings on Envirocare's pending radiation license renewal and work on permit modifications have been suspended. The suspension is a result of an investigation into allegations that an Envirocare employee who certified documents submitted to state regulators as part of the relicensing process was not actually an engineer licensed by the State of Utah, as he had claimed to be. The employee has been fired.

DEQ will require a licensed engineer's review of all facilities and structures for which plans were originally submitted under the name of the former employee. Envirocare President Charles Judd said in a prepared statement that the company "will move forward and commit every resource necessary to reverifying the engineering work of this individual." In the meantime, Envirocare is operating under existing licenses and permits.

—CN

Interstate Agreement for the Uniform Application of Manifesting Procedures

On March 27, 1995, at the request of states and compacts, the U.S. Nuclear Regulatory Commission issued a final rule titled "Low-Level Waste Shipment Manifest Information and Reporting." (60 *Federal Register* 15,649) In general, the rule requires the use of standard waste reporting forms for the shipment of commercial low-level radioactive waste by the nation's generators, collectors, and processors. In most instances, the rule provides specific information on how to identify the entity to be listed as the generator of commercial low-level radioactive waste on the manifest form. However, the rule affords states and compacts latitude to take an alternative approach in identifying the generator with regard to discarded sealed sources and waste resulting from either decontamination processes or incineration.

The interstate manifesting agreement was drafted by an LLW Forum working group in order to provide uniform guidelines regarding disposal responsibility for waste resulting from incineration and decontamination processes. (The agreement does not address sealed sources because Forum Participants were not able to reach consensus on disposition of this waste stream, at this time, and because the issue does not appear to be ripe for a decision.) In general, the agreement provides that both decontamination and incineration wastes should be attributed to the original generators of the waste whenever possible. Consistent with the Inter-regional Access Agreement for Waste Management executed by most states and compacts, the interstate manifesting agreement also provides that the parties will not impede the return of waste shipped outside their borders for decontamination or incineration if it can be attributed back to the original generator.

—TDL

U.S. Nuclear Regulatory Commission

NRC Staff Get Briefed on Draft Assured Isolation Facility Licensing Study

On June 3, three staff members from DOE's National Low-Level Waste Management Program (NLLWMP) and three of the program's contractors gave a presentation to staff of the U.S. Nuclear Regulatory Commission on a draft assured isolation facility licensing study that is being conducted by the program at the request of states. The meeting was requested by NLLWMP staff and, following NRC policy, was open to the public. In addition to the aforementioned NLLWMP staff and contractors, attendees at the briefing included ten NRC staff members, four state officials from two different states, one company representative, and one staff person from the Low-Level Radioactive Waste Forum. The formal agenda for the briefing was as follows:

- Introduction
- Purpose, Structure and Organization of the Report
- Discussion of Basic Licensing Approach
- Discussion of Key Licensing Issues
- Volume 2 "Walk-Through"
- Wrap-Up/Next Steps

The licensing study for an assured isolation facility relies on licensing criteria from 10 CFR Parts 30, 40, and 70 Guidance. It is expected to be released in final form on July 24, 1998. A separate study on whether the establishment of an assured isolation facility would meet a state or compact's obligation to provide disposal capacity pursuant to the Low-Level Radioactive Waste Policy Act and its 1985 amendments is being conducted by the Connecticut Hazardous Waste Management Service. That study, which is in draft form and is currently being circulated for comment, is expected to be released in September 1998.

In compliance with NRC guidelines, minutes of the NRC meeting are available and have been placed in NRC's public document room.

—TDL

For further information, contact Tom Kerr of the NLLWMP at the Idaho National Engineering and Environmental Laboratory at (208)526-8465.

Health Physics Society Approves Incineration Standard

On March 19, 1998, the Health Physics Society (HPS) approved an American National Standard for the incineration of institutional low-level radioactive waste. This standard, which was originally developed under the direction of the HPS Standards Committee, is intended to provide minimum requirements for incineration of low-level radioactive waste that is generated at facilities such as medical centers, universities, and research institutions. The standard addresses identification and classification of wastes, selection and siting of incineration equipment, licensing and permitting requirements, control and monitoring, disposal of residues, documentation, and decontamination and decommissioning.

—RTG

For further information, contact the HPS at (703)790-1745. Use reference number N13.45-1998.

NRC Plans EIS for Proposed Spent Fuel Facility; Conducts Hearing and Admits Parties

Utah Legislature Passes Bills Opposing Facility

The U.S. Nuclear Regulatory Commission recently took several steps in its review of a license application by Private Fuel Storage (PFS), L.L.C. to construct an above-ground facility for the temporary storage of spent nuclear fuel on a Native American reservation in Utah. These steps include decisions to prepare an Environmental Impact Statement (EIS) and to conduct a scoping meeting on the proposal. Meanwhile, the legislature of the State of Utah has passed several bills criticizing the proposal and expanding the state's regulatory role over such waste.

The Public Hearing and New Plans to Prepare an EIS

Hearing/Parties After reviewing petitions for a hearing on the license application, NRC's Atomic Safety and Licensing Board decided to schedule a pre-conference hearing for January 27–29 in Salt Lake City, Utah on contentions and standing issues. The board determined that the following petitioners had established standing to participate in the hearing: the Castle Rock Land and Livestock Co. and the Skull Valley Co. Ltd.; Ohngo Gaudadeh Devia (a Native American Group); the Confederate Tribes of the Goshute Reservation; the Skull Valley Band of Goshute Indians; and the State of Utah. A closed prehearing conference on security plan contentions was held in Rockville, Maryland on June 17, 1998.

Environmental Impact Statement Following the pre-conference hearing, NRC determined that the PFS proposal warrants the preparation of an EIS because it constitutes a major federal action. In June, NRC conducted an EIS scoping process for the proposed facility, which would be located on the Skull Valley Band of Goshutes' reservation in Tooele County, Utah. NRC will now prepare a draft EIS, which will be released for public comment upon completion.

Utah Legislation

On March 21, 1998, SB 196 was signed into law by Utah Governor Michael Leavitt (R)—an acknowledged opponent of the PFS proposal. The new law extends the state's process for approving high-level waste storage and treatment facilities to cover also the transfer, storage, decay in storage, treatment or disposal of greater than-class-C waste. Under the law, a facility accepting such waste would need to obtain a permit from the Utah Department of Environmental Quality and to receive the approval of the Governor and state legislature. A $5 million application fee is required for the necessary permit and approvals.

In addition, two resolutions criticizing the PFS proposal were passed by the state House of Representatives—HCR 6 and HJR 17. HCR 6 has been signed by the Governor. As of press time, the Governor has not signed HJR 17.

Background

PFS is a consortium of seven nuclear utility companies led by Northern States Power Company. It submitted a license application to NRC to build and operate an independent spent fuel storage installation on June 20, 1997. NRC held a prehearing conference on the application in Utah in late January 1998. (See *LLW Notes*, February 1998, p. 37.)

—TDL

For additional background information, see LLW Notes, July 1997, pp. 34–35.

President Clinton Names Energy Secretary

Changes at DOE, DOI and NRC

On June 18, President Bill Clinton announced his intention to nominate Bill Richardson, U. S. Ambassador to the United Nations, as the next Energy Secretary. In an April 6 memo to U.S. Department of Energy employees, then-Energy Secretary Federico Peña had announced his intentions to leave the Administration effective June 30. Until Richardson is confirmed as Energy Secretary by the U.S. Senate, Energy Deputy Secretary Elizabeth Moler will serve as Acting Secretary.

Prior to serving as Ambassador to the United Nations, Bill Richardson represented New Mexico's Third Congressional District for eight terms. While a member of the U.S. Congress, he held the post of Chief Deputy Whip and was a member of the Resources Committee, the Permanent Select Committee on Intelligence, and the Helsinki Commission on Human Rights.

In 1985, while serving as U.S. Representative, Bill Richardson voted in favor of the 1985 Low-Level Radioactive Waste Policy Amendments Act (there were no opposing votes).

Interior Deputy Chief of Staff Appointed

On June 10, Interior Secretary Bruce Babbitt announced the appointment of Kenneth Smith as Interior Deputy Chief of Staff. He succeeds Susan Rieff, who resigned in February. Smith joined the Department of the Interior (DOI) in 1993 and has previously served as Deputy Director for the Fish and Wildlife Service, Interior Deputy Director of Congressional and Legislative Affairs, and Director of External Affairs. He resigned from DOI in July 1997 to return to his home state of Arkansas.

As Deputy Chief of Staff, Smith will coordinate management issues, handle special assignments for the Interior Secretary, and serve as special initiatives liaison to the White House.

Greta Dicus Renominated as NRC Commissioner

On May 22, President Bill Clinton nominated Greta Dicus to a second term as NRC Commissioner. NRC Commissioners serve staggered five-year terms; one term expires on June 30 of each year. Dicus' first term as NRC Commissioner expired on June 30 of this year.

Dicus had served as NRC Commissioner since February 1996. (See LLW Notes, Jan./Feb. 1996, p. 9.) Prior to joining the federal government, Dicus was Director of the Division of Radiation Control and Emergency Management of the Arkansas Department of Health. She was also a Commissioner of the Central States Low-Level Radioactive Waste Commission, and had served as Chair of the commission, and as a Forum Participant.

The nomination requires confirmation by the U.S. Senate. The five-member NRC Commission cannot have more than three members with the same political party affiliation. According to NRC's Public Information Office, the current NRC Commissioners' party affiliations are as follows: Chairman Shirley Ann Jackson (D), Commissioner Nils Diaz (R), Commissioner Edward McGaffigan (D). (See LLW Notes, Aug./Sept. 1996, p. 37) Press reports have stated that Republican Senators have communicated a reluctance to act on the nomination of Dicus (D) until a Republican nomination is also made.

Under the Energy Reorganization Act of 1974, as amended, three NRC Commissioners are needed to constitute a quorum for the transaction of business. NRC Chairman Shirley Ann Jackson's term is the next to expire—on June 30, 1999.

—LAS

Ysleta Del Sur Pueblo v. Jacobi

Texas Responds to Lawsuit re Aboriginal Rights to LLRW Site

On May 12, members of the Board of Directors of the Texas Low-Level Radioactive Waste Disposal Authority and its General Manager, Lawrence Jacobi, filed an answer to a lawsuit involving claims of aboriginal rights to the proposed site for a low-level radioactive waste disposal facility in Hudspeth County, Texas. The suit—which was filed on March 4 in the U.S. District Court for the Western District of Texas by Ysleta Del Sur Pueblo (Pueblo), a federally recognized Indian tribe—seeks to compel the Authority to vacate and remove all of its equipment from the site.

Background

In the action, the Pueblo asserts an aboriginal right to possess the land upon which the Texas Authority proposes to site a disposal facility and claims that this aboriginal right supersedes any claims to the land made by the defendants. As a basis for its claim, the Pueblo points to provisions in the Treaty of Guadalupe Hidalgo, dated February 2, 1848, which the tribe claims guarantees the protection of title held by Mexican citizens to lands in the United States. The Pueblo also relies upon the Indian Non-Intercourse Act, which restricts the conveyance of lands held by Native Americans.

On April 29, the district court denied the defendants' motion to dismiss the action. The motion argued for dismissal due to a lack of subject matter jurisdiction and due to the plaintiff's failure to join the State of Texas as a party. (See *LLW Notes*, May 1998, pp. 16–17.)

The Answer

In their answer, the defendants deny that the plaintiffs have an aboriginal right to possess the subject property. In addition, they contend that the district court does not have jurisdiction to hear the action.

The answer contains several affirmative defenses to the suit, as follows:

- the complaint fails to state a claim upon which relief can be granted;
- any claims and causes of action that the plaintiffs may put forth are barred by the Eleventh Amendment to the U.S. Constitution, which prohibits any actions in federal court against a state or state agency unless Congress has abrogated the state's immunity or the state has expressly waived its immunity to suit;
- the Texas Authority has record title to the disputed property; and
- any claims and causes of action that the plaintiffs may put forth are barred by the State of Texas' statute of limitations because the Texas Authority has had adverse possession, in good faith, of the disputed property during the three years immediately preceding the filing of the complaint.

As of press time, a trial date has not been set by the court.

—TDL

Waste Control Specialists, L.L.C. v. U.S. Department of Energy

Appellate Court Denies WCS' Petition for Rehearing, Declines to Address Due Process Claim

District Court Dismisses Case Without Prejudice at Request of WCS

On June 17, 1998, the U.S. Court of Appeals for the Fifth Circuit denied a petition for rehearing filed by Waste Control Specialists, a Texas-based company that provides waste management services, in its lawsuit against the U.S. Department of Energy. In its decision, the court specifically declined to address WCS' due process contention regarding DOE's conduct on contracting procedures, instead finding that the lawsuit is premature. The appellate court had previously dismissed the action by order dated May 14, 1998.

Following the appellate court's action, WCS filed a motion to dismiss the case in the U.S. District Court for the Northern District of Texas. The district court granted WCS' motion on July 6 without prejudice to the due process and related procedural claims previously raised by WCS. A representative for the company stated that WCS will decide what course of action to pursue on this matter after it reviews DOE's recent award of the Fernald contract to Envirocare.

The Appellate Court's Decision

The following is a reprint of the complete text of the appellate court's June 17 decision.

> Waste Control Specialists complains by petition for rehearing that we have decided its due process claims prematurely. To the contrary, we have decided that Waste Control's lawsuit is premature. We have only decided that the Department of Energy has followed the statutes in the policies thus far announced for Fernald contract proposals. Waste Control's suit seeks a declaration that its proposal may not be rejected by DOE because the DOE policy is illegal. We deny that claim without reaching any due process contention about DOE's conduct of the contracting procedure in any other respect for cleanup of the Fernald nuclear site.
>
> Amicus Andrews International Foundation complains that our opinion allows the Department of Energy to surrender all regulation of disposal sites to the states or to no one. Our opinion did not address the regulation of disposal sites except to say that the statutes provide for either Nuclear Regulatory Commission or Department of Energy control.
>
> The petition for rehearing is denied.

WCS' Response

In a June 18 press release, WCS asserts that the appellate court's decision "clarified" the company's ability to sue DOE for alleged due process violations "if DOE awards a major waste disposal contract to Envirocare of Utah."

WCS President Kenneth Bigham stated, "We're delighted with the court's clarification. We presumed, incorrectly, that the court's original ruling dismissed our serious due process claims against DOE. Now we know we can go back to the district court and challenge DOE's award of the Fernald contract to Envirocare—which seems all but inevitable. And we intend to do just that."

WCS also contends that the court's ruling leaves unanswered the question of whether DOE can rely only on state regulation without specifically delegating its Atomic Energy Act authority to a state.

> The court's ruling also casts a shadow on continued reliance on the state of Utah to regulate more that 14 million cubic feet of DOE wastes at the Envirocare site. Although ruling that DOE has the discretion to require an NRC or Agreement State license as a precondition for award of a disposal contract, the court stated that its opinion "did not address the regulation of disposal sites except to say that the statutes provide for either Nuclear Regulatory Commission or Department of Energy Control."

Background

Appellate Court's Earlier Decision The suit addresses DOE's authority to use private, commercial low-level radioactive waste disposal facilities. In its May 14 order, the appellate court had determined that the issue of whether or not a state or NRC license is required for the acceptance of DOE waste at a private facility depends on who "controls" (or regulates) the site—DOE or the contractor. Moreover, the court determined that DOE control of the site is discretionary; DOE cannot be compelled to exercise regulatory authority over a site.

> If DOE chooses to regulate, or "control", the private waste disposal sites, then the sites are exempt from NRC and state licensing requirements. Where, however, DOE does not exercise such control, the NRC and the agreement states retain their power to regulate commercial sites providing a service to DOE. Nothing in the statute indicates that DOE must exercise regulatory authority over such sites. (citations omitted)

For further information on the appellate court's prior decision, see LLW Notes, May 1998, pp. 1, 19-20.

WCS' Petition for Rehearing On June 5, 1998, WCS filed a petition for rehearing in the U.S. Court of Appeals for the Fifth Circuit, arguing as follows:

> The court effectively ruled on the merits of Appellee's case on an interlocutory appeal of a preliminary injunction. Applicable law dictates that, at a minimum, the Court should have remanded the case for further proceedings consistent with the Court's holdings. WCS is entitled by law to have its Fifth Amendment due process claims heard, none of which are foreclosed from review even if the Court is correct that the WCS lawsuit raises issues committed to the Department of Energy's ... discretion by law.

WCS' due process claims are as follows:

- the WCS proposal was not rejected for failure to possess a license—a license was not an agreed condition for bidding;
- WCS has been debarred without due process because, even assuming that DOE has unfettered discretion to require a license, such discretion has not been exercised to date; and
- WCS' proposal was rejected by DOE policy makers for impermissible, fraudulent, or criminal reasons.

In its appeal, WCS asserts that these due process obligations exist independent of agency discretion.

—TDL

Midwest Interstate Low-Level Radioactive Waste Commission v. Toledo Edison Company

Midwest Compact Sues Utilities re Export Fee Fund Distribution

On June 4, 1998, the Midwest Interstate Low-Level Radioactive Waste Commission filed a complaint for interpleader in the U.S. District Court for the District of Minnesota concerning the distribution of its Export Fee Fund. A complaint for interpleader is a legal mechanism whereby a plaintiff requests that the court join parties with competing claims to property—which property is in the possession or control of the plaintiff and to which the plaintiff claims no entitlement—in a single action so that the plaintiff will not be exposed to multiple suits or liability.

The commission filed the interpleader action due to a dispute with utility companies from the State of Michigan, which was formerly a member of the Midwest Compact, over whether or not they are entitled to receive any portion of the fund upon its dissolution. According to commission representatives, the commission determined that the filing of an interpleader action would be the most expedient way to include all of the parties with claims in the same case and to avoid multiple lawsuits.

The following utilities are listed as defendants to the action: Toledo Edison Company; Cleveland Electric Illuminating Company; IES Utilities, Inc.; Northern States Power Company; Union Electric Company d/b/a Ameren UE; Wisconsin Electric Power Company; Wisconsin Public Service Corporation; Detroit-Edison Company; Indiana Michigan Power Company; and Consumers Power Company.

Background

Export Fee Fund In 1987, the Midwest Commission resolved to assess fees against utilities operating nuclear reactors in its member states in order to finance development of a regional low-level radioactive waste disposal facility. Once collected, the fees were deposited into a fund, known as the Export Fee Fund, which was administered by the commission for that purpose. To date, the defendant utilities have paid export fees totaling $14,593,965.50 to the fund.

Guaranty by Michigan Utilities On June 30, 1987, the State of Michigan was designated as the host state for the region's first low-level radioactive waste disposal facility. Negotiations followed concerning the transfer of funds from the commission to the Michigan Low-Level Radioactive Waste Authority for the development of the regional waste disposal facility. The complaint asserts that, during these negotiations, the commission unsuccessfully sought the Michigan Authority's promise that amounts transferred to the Authority from the fund would be repaid if a facility were not established in Michigan. An impasse ensued and a deal was eventually reached whereby the Michigan utilities agreed that, should a facility not be established in the state, they would repay to the commission a portion of any funds transferred to the Authority. On November 21, 1988, the Michigan utilities entered into such a guaranty with the commission. The guaranty, which only covered amounts transferred in fiscal years 1988 and 1989, applied only to transferred amounts traceable to fee assessments paid by non-Michigan utilities. It matured only if the Michigan legislature failed to appropriate repayment monies within one year of being asked to do so.

During fiscal years 1988 and 1989, the commission transferred $3,000,000 from the fund to the Michigan Authority. The commission transferred $3,615,567 in fiscal year 1990 to the Authority. Funds transferred in 1990, however, were not covered by the guaranty. The complaint alleges, however, that the Michigan utilities agreed in writing that funds transferred in fiscal year 1990 would be deemed to consist exclusively of fee assessments paid by the Michigan utilities, thus expending all Michigan contributions to the fund. The State of Michigan contests this assertion.

Expulsion of Michigan as Host State and Fund Repayment On July 24, 1991, the commission revoked Michigan's membership in the compact and immediately requested the Michigan Authority to seek a legislative appropriation to repay monies transferred to it from the Fund. The Michigan legislature failed to appropriate the necessary monies and, in early November 1992, the Michigan utilities and the commission reached an agreement to liquidate the Michigan utilities' repayment obligation. According to the complaint, "the Michigan utilities repaid the Fund according to a formula which, when repayment was complete, resulted in the Fund no longer containing monies traceable to export fees paid only by the Michigan Utilities." Pursuant to the terms of the agreement, the Michigan utilities repaid $1,358,882 to the commission.

Dissolution of the Fund After Michigan's expulsion from the compact, the State of Ohio was designated as the host state. However, on June 26, 1997, the commission resolved to halt development of a regional disposal facility "based on reduction in the levels of low-level radioactive waste generated in the Region and the continuing availability of low-level radioactive waste disposal facilities outside the Region with sufficient capacity to accept waste for a lengthy, although indefinite time." Accordingly, on November 3, 1997, the commission adopted a resolution authorizing dissolution of the Export Fee Fund and began making plans to distribute the balance of the fund by year's end.

The Dispute

Contested Issues In providing for dissolution of the Export Fee Fund, the Midwest Commission determined that the Michigan utilities should be excluded because their "repayment obligation was liquidated such that remaining amounts in the Fund were traceable only to export fees paid by electric utilities other than the Michigan Utilities." The Michigan utilities disagreed. On November 25, 1997, they sent a letter to the commission requesting an accounting of their contributions to the fund, asserting an entitlement to a portion of the fund, and seeking an indication of the amounts that they would receive upon dissolution of the fund. The commission responded, explaining its view that the Michigan utilities were not entitled to share in the fund. When the Michigan utilities persisted in their claims, however, the commission determined not to proceed with distribution of the fund as planned.

The Michigan utilities have since quantified their claim to be 36.8 percent of the fund and have consented to distribution of the remaining 63.2 percent of the fund to the defendants. Consequently, the more than $3.8 million which Michigan claims, remains in dispute.

Requested Relief The complaint asserts that "[t]he interest of the Commission in the Fund is limited to its role as custodian of the Fund pending final distribution as directed by the Court in this action."

Specifically, the commission is asking that the court

- issue process for each of the defendants and order them to interplead and settle among themselves their respective interests in the fund;
- enjoin and restrain the defendants from instituting or prosecuting further any proceeding on account of the fund and their asserted interests therein;
- discharge and relieve the commission from all liability to the defendants with regard to the fund;
- award the commission its attorney's fees, disbursements and proper costs and charges; and
- grant such other and further relief as the court may deem just and appropriate.

—TDL

New York v. Clinton
Snake River Potato Growers v. Rubin

U.S. Supreme Court Finds Line-Item Veto to be Unconstitutional

On June 25, the U.S. Supreme Court struck down as unconstitutional the line-item veto authority granted to the President by the U.S. Congress in 1996. In a 6-to-3 decision, the Court held that the law providing the President with such authority violates the constitutional requirement that every bill be presented to the President for his approval or veto. In contrast, the law as written allowed the President to cancel specific items in tax and spending measures without vetoing the entire bill.

This case may be of interest to Forum Participants not only for its impact on federal agency budgetary matters, but also for its potential impact on the President's ability to veto state-sponsored legislation that could be attached to appropriations measures.

The Decision

Justice John Paul Stevens wrote the majority opinion, which was joined by Chief Justice William Rehnquist and by Justices Anthony Kennedy, David Souter, Clarence Thomas, and Ruth Bader Ginsburg. In reviewing the line-item veto authority, the majority concluded that the exercise of such authority amounts in essence to a partial veto, which they determined can only be authorized through a constitutional amendment. "If there is to be a new procedure in which the President will play a different role in determining the text of what may become a law, such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution."

Justices Antonin Scalia, Sandra Day O'Connor, and Stephen Breyer dissented from the majority opinion. In his dissenting opinion, Scalia wrote as follows: "The title of the Line-Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court ... The President's action it authorizes in fact is not a line-item veto."

Background

The Line-Item Veto Act (Pub. L. No. 104-130) was passed by Congress in 1996. It authorized the President to cancel in whole, at any time up to five days after signing a bill into law, any dollar amount of appropriation, any item of new deficit spending, or any limited tax benefit contained in the bill.

Shortly after the act's passage, six members of Congress filed suit in the U.S. District Court for the District of Columbia challenging the act as unconstitutional. The court agreed, striking down the law on April 10 as violative of the separation of powers doctrine of the U.S. Constitution. The Supreme Court reversed the lower court's decision, however, dismissing the action upon a finding that the appellees lacked standing to file suit because they failed to allege any injury to themselves as individuals and the institutional injury that they allege is "wholly abstract and widely dispersed." (See *LLW Notes*, August/September 1997, pp. 24–25.)

The current cases were filed in the U.S. District Court for the District of Columbia in 1997. The district court issued an opinion on February 12, 1998, declaring the President's line-item veto authority to be unconstitutional. As the act provides for a direct, expedited appeal to the U.S. Supreme Court, the defendants filed a jurisdictional statement asking the Court to note probable jurisdiction shortly after the district court rendered its decision. (See *LLW Notes*, May 1998, p. 15.)

—TDL

US Ecology v. Nebraska

Nebraska Supreme Court Takes Jurisdiction of Wetlands Case

Briefing Schedule Set

On May 11, the Supreme Court of the State of Nebraska took jurisdiction—on its own initiative—over a lawsuit filed by US Ecology against the state and two state agencies. Shortly thereafter, the court denied US Ecology's motion for expedited review of the case, but did so without prejudice for refiling once the briefing is completed.

Background/Prior Court Action The case involves a challenge to the state's authority to determine that the placement of fill in a "small depression" on the site of the Central Interstate Low-Level Radioactive Waste Compact's proposed disposal facility constitutes the "commencement of construction" and is prohibited until after the issuance of a license for the facility.

On February 26, 1998, the District Court of Lancaster County, Nebraska, ruled in favor of US Ecology, finding that the state had no such authority. In addition, the court found that one of the defendant agencies, the Nebraska Department of Health and Human Services, has no jurisdiction over the licensing of the facility. (See *LLW Notes*, March 1998, pp. 19-21.) Nebraska filed an immediate appeal of the district court's ruling.

Briefing Schedule The state supreme court set the following briefing schedule for the case:

- brief of the State of Nebraska and its agencies is due July 17, 1998;
- US Ecology's brief is due 30 days after the filing of the appellants' brief; and
- Nebraska's reply brief is due 14 days after the filing of appellee's brief.

As of press time, oral arguments have not been scheduled in this matter.

—TDL

Waste Control Specialists, LLC v. Envirocare of Texas, Inc.

WCS Suit Against Competitor to Remain in Federal Court

On May 26, 1998, the U.S. District Court for the Western District of Texas denied a motion by Waste Control Specialists (WCS) to remand its lawsuit against Envirocare of Texas back to state court. The case was removed from the District Court of Andrews County, Texas, at the request of Envirocare on April 13, 1998. WCS filed a petition for reconsideration of the court's May 26 order, but that petition was denied on June 25, 1998.

Background The case, which was filed by WCS on May 2, 1998, charges that the defendants violated state and federal law by committing free enterprise and antitrust violations, making libelous and slanderous statements, engaging in business disparagement, and committing tortious interference with prospective business relations. (See *LLW Notes*, July 1997, pp. 20–22.) The following parties are named as defendants to the action: Envirocare of Texas, Inc.; Envirocare of Utah, Inc.; Khosrow Semnani and Charles Judd, who are both officers of Envirocare; and other individuals.

Outstanding Motion As of press time, the court has not ruled on Envirocare's previously filed motion to dismiss the action. Envirocare's motion argues that the plaintiff's claims cannot be sustained because any harm to WCS is a result of valid government decision making.

—TDL

California Department of Health Services v. Babbitt
US Ecology v. Department of the Interior

District Court Holds Hearing re Ward Valley

On June 17, the U.S. District Court for the District of Columbia held a hearing in a case that seeks to compel the U.S. Interior Department to (1) transfer federal land in Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility, and (2) to issue a patent approved by the Interior Department four years ago.

Judge Emmet Sullivan began the hearing by expressing his inclination to stay further action on the case pending a decision by the U.S. Court of Federal Claims in a related action. In that case, US Ecology and the California Department of Health Services are suing the federal government for an alleged breach of contract, arguing that the defendants failed to transfer the Ward Valley land pursuant to a valid contract. (See *LLW Notes*, April 1997, pp. 18–19.) The cases are being heard in two different courts because neither court has the jurisdiction to grant all of the relief requested.

After attorneys for both sides expressed opposition to a stay of the proceedings, Sullivan determined to take the issue under advisement and to proceed with the hearing. During the hearing, a host of issues were addressed, including among others:

- whether the existence of a valid contract is relevant to the claim at hand,
- how agency discretion under the Administrative Procedure Act impacts the plaintiffs' cases,
- whether the outgoing Interior Secretary violated a temporary restraining order issued by another federal district court when he signed the record of decision on the land transfer,
- whether it would be appropriate for the court to supervise further environmental review of the land transfer and/or to impose a time schedule, and
- what significance, if any, should be given to Interior's claim that the California Department of Health Services may not possess the requisite authority to acquire the land.

At the end of the hearing, Sullivan indicated that he would take the parties' arguments under advisement. To date, there has been no further action in the case.

—TDL

United States v. Bestfoods

Supreme Court Limits Parent Company Cleanup Liability

In June, the U.S. Supreme Court issued a decision that limits the legal responsibility of parent companies for the cleanup of hazardous waste sites owned by subsidiaries. The decision, however, holds that parent companies may still be liable for cleanup costs if they actively manage environmentally dangerous facilities.

The key question when looking at the issue of parent company liability, according to the Court's opinion, is whether a company's involvement in the direct operation of the facility is greater than normal for a parent company. Parent companies, however, are not liable simply for "monitoring of the subsidiaries performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures."

The issue of parent company liability often arises when the subsidiary becomes defunct, leaving the government with few options for obtaining contributions from the company toward cleanup.

—TDL

Chester Residents Concerned for Quality Living v. Seif

Supreme Court Grants Certiorari in Title VI Case

On June 8, 1998, the U.S. Supreme Court agreed to review whether a private right of action exists to enforce EPA regulations. The case to be reviewed by the Court, which involves the application of environmental justice concepts to state permitting programs, was filed by Chester Residents Concerned for Quality Living (CRCQL) against the Pennsylvania Department of Environmental Protection (PADEP) and PADEP Secretary James Seif. It challenges PADEP's issuance of permits for various solid waste facilities in Chester as violative of section 601 of Title VI of the Civil Rights Act of 1964, the Environmental Protection Agency's civil rights regulations, and PADEP's assurance pursuant to the regulations that it would comply with them. (See *LLW Notes*, April 1998, pp. 10–13.)

Background The case was originally dismissed by the U.S. District Court for the Eastern District of Pennsylvania, which held that a private right of action to enforce EPA regulations does not exist for a disparate impact claim. The U.S. Court of Appeals for the Third Circuit reversed the lower court's decision, however, finding that a private right of action exists under discriminatory-effect regulations promulgated by federal agencies pursuant to section 602 of Title VI. PADEP filed a petition for writ of certiorari with the U.S. Supreme Court on March 30, 1998, seeking permission to appeal the appellate court's finding that a private right of action exists to enforce EPA regulations. (See *LLW Notes*, February 1998, pp. 30–31.) The district court has stayed further consideration of the case until the Supreme Court issues a ruling.

Schedule According to the Court's memorandum, the case is expected to be scheduled for oral argument in the October Term 1998 session. PADEP's brief on the merits is due August 7, 1998. CRCQL's brief on the merits is due 30 days after receipt of PADEP's brief.

—TDL

Wisconsin Department of Corrections v. Schacht

Supreme Court Limits Eleventh Amendment Immunity

On June 22, the U.S. Supreme Court issued a decision with important implications to states' Eleventh Amendment immunity protection. The Court held that federal courts have the authority to hear actions against state agencies or officials even if some of the claims must be dismissed due to a state's legal immunity under the Eleventh Amendment.

Ruling in a case involving a fired Wisconsin prison guard, the Court held that a federal court can dismiss some claims and hear the rest of the case instead of having to send the entire case to state court. Wisconsin's assertion of immunity "does not destroy ... jurisdiction over the remaining claims in the case before us," according to the Court's opinion. "A federal court can proceed to hear those other claims."

The Court agreed with the State of Wisconsin that a state is entitled to have claims based on federal law decided in a federal court, regardless of whether certain claims contained in the original pleading are barred by the Eleventh Amendment. Wisconsin had argued that ruling otherwise would allow persons who sue state officials to prevent the case from being moved to federal court simply by asserting a claim that would be barred pursuant to state immunity rules.

In addressing the issue, the Court held that Wisconsin's decision to invoke immunity "placed the particular claim beyond the power of the federal courts to decide, but it did not destroy ... jurisdiction over the entire case."

—TDL

Northern States Power Company v. U.S. Department of Energy
Duke Energy Corporation v. U.S. Department of Energy
American Electric Power v. U.S. Department of Energy
Florida Power and Light Company v. U.S. Department of Energy
Indiana Michigan Power Company v. U.S. Department of Energy

Utilities Seek $2.5 Billion from DOE for Failure to Take Spent Fuel

On June 8, five utilities filed separate lawsuits against the U.S. Department of Energy in the U.S. Federal Court of Claims. The utilities are seeking a total of nearly $2.5 billion in damages for DOE's failure to accept their spent fuel for disposal by January 31, 1998, as provided for under the Nuclear Waste Policy Act and the "standard contract" that DOE entered into with utilities beginning in 1983. (See *LLW Notes*, Winter 1997, p. 29.) The five utilities filing the suits include Northern States Power Company, Duke Energy Corporation, American Electric Power, Florida Power and Light Company, and Indiana Michigan Power Company. Similar suits were filed earlier this year by Yankee Atomic, Connecticut Yankee, and Maine Yankee seeking a total of $288 million in damages.

The Complaints

The new lawsuits all contend that the department has failed to fulfill its "unconditional obligation to dispose of the [utilities'] spent nuclear fuel," thereby subjecting the utilities to substantial additional costs for storage and the like. Moreover, all five complaints include language intended to preempt possible DOE defenses, such as that the department's failure is due to funding shortfalls or that the department is unable to accept the material for disposal. In this regard, the plaintiffs point out that DOE's annual expenditures from the Nuclear Waste Fund have been well below the level of annual receipts and that DOE has repeatedly accepted spent fuel from other entities—such as foreign research reactors.

DOE's Response

In response to the complaints, DOE officials issued a statement referencing the department's May 18 settlement proposal, which was made following earlier litigation initiated by several nuclear utilities, states, and state agencies. (See next page.) The proposal offers to postpone utility payments into the fund for those entities that agree not to seek damages. It has not been well accepted by the utilities, however.

> Our proposal is a good faith offer that is consistent with the court's direction to provide economic relief to the utilities for costs incurred as a result of the department's delay in accepting their spent fuel ... The department understands the utilities' desire to have the department accept the spent fuel and we acknowledge our obligation to do so. The settlement offer was an effort to provide immediate relief until we are in a position to accept the fuel. Our analysis indicates that our offer is an attractive one for a number of utilities and we are surprised that they chose to reject it without further dialogue. We hope that individual companies continue to weigh our offer in light of the realistic alternative.

DOE Makes Spent Fuel Settlement Offer; Utilities Reject It

The Offer On May 18, Energy Secretary Federico Peña offered to postpone payments into the Nuclear Waste Fund for those utilities that agree not to pursue claims relating to DOE's failure to accept spent fuel by the statutory and contractual deadline of January 31, 1998. Under the terms of the proposal, DOE would modify its "standard contract" such that a settling utility could retain a portion of the fees it currently pays into the fund pending DOE's acceptance of the utility's spent fuel. Specifically, a settling utility's fees would be "limited to its share of the funds appropriated by Congress from the Nuclear Waste Fund to support [DOE's] Civilian Radioactive Waste Management program for that year ... The utility would retain the balance of its fees." The retained fees could be invested by the utilities, with investment proceeds being applied toward additional storage costs after payment of interest due the government. Peña estimated the interest rate to be approximately 5 percent.

The Utilities' Response Nuclear utilities jointly rejected Peña's offer in a June 2 letter from Nuclear Energy Institute President Joe Colvin. The letter, while expressing appreciation for Peña's efforts to provide compensation, stressed that the proposal falls far short of what would be required for the utilities to settle their claims. "[A] complete failure of DOE to accept used fuel would subject the United States to very high damages, possibly to the extent of $33 to $55 billion, or more." The letter indicated that the utilities are "united" in their opposition to the proposal.

—TDL

Senate Fails to Approve Cloture Petition on HLW Bill

On June 2, the U.S. Senate refused to approve a cloture petition on a new version of the Nuclear Waste Policy Act of 1997. The new version was drafted following pre-conference discussions on previously-passed House and Senate versions of the bills. It incorporates provisions of both of the older versions, as well as concessions made during the pre-conference discussions.

The highly contested bill, which has been a focus for much of this legislative session, concerns the construction of a temporary storage facility for high-level nuclear waste and spent fuel at Yucca Mountain, Nevada. The Nevada delegation opposes the bill, and the President has vowed to veto it, arguing that it would designate Yucca Mountain as the nation's nuclear waste disposal site without a thorough review and would divert resources from the permanent repository now under study.

Failure of Cloture Vote The Senate voted 57 to 39 in favor of the cloture petition. However, Senate rules require at least 60 votes to invoke cloture—a process that limits the amount of time allotted to debate a particular piece of legislation. The unsuccessful vote was a surprise to many observers, especially given that last year 65 Senators voted in favor of an earlier version of the legislation. Most analysts predict that the failed vote will effectively kill the bill for the remainder of this congressional session, given the likelihood that opponents would mount a delaying filibuster if supporters of the bill were to try to bring it to the floor.

Background The issues addressed in the bill are a response to the federal government's refusal to take spent fuel from commercial nuclear power plants beginning in 1998, as provided for in the Nuclear Waste Policy Act of 1982 and in "standard contracts" entered into between the U.S. Department of Energy and the nuclear utilities. S. 104, an earlier version of the Senate bill, passed the full Senate on April 15, 1997, by a vote of 65 to 34. Although the bill was amended several times prior to its passage, the final tally was two votes shy of a veto-proof margin—but two votes higher than the 1996 tally on a similar bill. (See *LLW Notes*, April 1997, pp. 30–31.) Similar legislation, with 166 cosponsors, was introduced in the U.S. House of Representatives and has been amended several times. That bill, H.R. 1270, passed the House by a vote of 307 to 120 on October 30, 1997. (See *LLW Notes*, Winter 1997, p. 39.)

—TDL

Court Calendar

Case Name	Description	Court	Date	Action
California Department of Health Services v. Babbitt and *U.S. Ecology v. Department of the Interior* (See *LLW Notes*, February 1998, pp. 20-21, 25.)	Seeks to compel the U.S. Interior Department to transfer land at Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility and to issue the patent approved by DOI four years ago.	United States District Court for the District of Columbia	June 17, 1998	The court held a hearing on defendants' motion to dismiss, cross-motions for summary judgment, and related issues.
Chester Residents Concerned for Quality Living v. Seif (See *LLW Notes*, April 1998, pp. 10-13.)	Involves allegations that the Pennsylvania Department of Environmental Protection (DEP) engaged in discriminatory activity by concentrating waste facilities in a predominantly black community.	United States Supreme Court	June 8, 1998 July 23, 1998 30 days after the filing of PADEP's brief	The U.S. Supreme Court granted Pennsylvania DEP's petition for writ of certiorari. The Pennsylvania Department of Environmental Protection's brief on the merits is due. Chester Residents' brief on the merits is due.
Midwest Low-Level Radioactive Waste Commission v. Toledo Edison Company (See related story, this issue.)	Seeks to join all of the regional utilities in one action to resolve a dispute over the Michigan utilities' right to share in the proceeds of the Export Fee Fund upon its dissolution.	United States District Court for the District of Minnesota	July 4, 1998	The Midwest Commission filed a complaint for interpleader in the district court, naming all of the regional utilities as defendants in the action.
New York v. Clinton and *Snake River Potato Growers v. Rubin* (See related story, this issue.)	Challenges the constitutionality of President Clinton's use of the line-item veto authority previously granted to him by the U.S. Congress.	United States Supreme Court	June 25, 1998	The Supreme Court issued a decision affirming the district court's ruling that President Clinton's use of line-item veto authority is unconstitutional.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (See *LLW Notes*, February 1997, pp. 14-16.)	Challenges recent motions of the commission seeking to impose deadlines and restrictions on state regulatory agencies.	United States District Court for the District of Nebraska	July 20, 1998	Trial is scheduled to begin.
Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (See *LLW Notes*, August/September 1997, pp. 22-23.)	Addresses whether the state may exercise veto authority over applications to import and export low-level radioactive waste from the region.	United States District Court for the District of Nebraska	April 15, 1998 April 27, 1998	The district court issued an order denying the commission's motion to dismiss and denying Nebraska's appeal of an earlier decision striking its demand for a jury trial. The commission filed its answer to the state's complaint.
US Ecology v. Nebraska (See *LLW Notes*, March 1998, pp. 19-21.)	Challenges the State of Nebraska's determination that certain activities proposed by US Ecology constitute an unlawful "commencement of construction."	Supreme Court of the State of Nebraska	May 11, 1998 May 26, 1998 June 8, 1998 July 17, 1998 30 days after filing of appellant's brief 14 days after filing of appellee's reply brief	The Supreme Court of Nebraska, on its own initiative, took jurisdiction. US Ecology filed a motion for expedited review. The court denied US Ecology's motion for expedited review without prejudice for refiling after briefing is done. State of Nebraska's brief is due. US Ecology's brief is due. Nebraska's reply brief is due.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Waste Control Specialists, L.L.C. v. Envirocare of Texas (See *LLW Notes*, July 1997, pp. 20-22.)	Challenges the actions of Envirocare of Texas and others as constituting antitrust violations, libel, slander, and business disparagement.	District Court of Andrews County, Texas	April 13, 1998	Envirocare filed a notice of removal to the U.S. District Court for the Western District of Texas.
		United States District Court for the Western District of Texas	April 21, 1998	WCS filed a motion to remand the case back to state court.
			May 1, 1998	Envirocare filed its response to WCS' motion to remand.
			May 26, 1998	The federal district court issued an order denying WCS' motion to remand.
			June 4, 1998	WCS filed a petition for reconsideration of the May 26 order.
			June 25, 1998	The federal district court denied WCS' petition for reconsideration.
Waste Control Specialists, L.L.C. v. U.S. Department of Energy (See related story, this issue.)	Alleges that senior DOE officials have not carefully or reasonably considered a WCS proposal to dispose of DOE radioactive waste at the company's Andrews County site.	United States Court of Appeals for the Fifth Circuit	May 29, 1998	The court granted DOE's emergency motion to shorten the time for filing a petition for rehearing.
			June 5, 1998	WCS filed its petition for rehearing.
			June 17, 1998	The court denied WCS' petition for rehearing.
		U.S. District Court for the Northern District of Texas	July 6, 1998	The district court granted WCS' motion to dismiss the case without prejudice to the due process and procedural claims.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Northern States Power Co. v. U.S. Department of Energy (See related story, this issue.)	Five major investor-owned utilities filed separate lawsuits seeking a total of more than $2.5 billion in damages from the U.S. Department of Energy for its failure to meet a contractual obligation to begin disposing of the utilities' spent fuel by January 31, 1998.	United States Court of Federal Claims	June 8, 1998	NSP filed a complaint seeking damages in excess of $1 billion.
Duke Energy Corp. v. U.S. Department of Energy (See related story, this issue.)			June 8, 1998	Duke Energy filed a complaint seeking damages in excess of $1 billion.
American Electric Power v. U.S. Department of Energy (See related story, this issue.)			June 8, 1998	AEP filed a complaint seeking $150 million in damages.
Florida Power and Light Co. v. U.S. Department of Energy (See related story, this issue.)			June 8, 1998	FPL filed a complaint seeking $300 million in damages.
Indiana Michigan Power Co. v. U.S. Department of Energy (See related story, this issue.)			June 8, 1998	Indiana Michigan filed a complaint seeking $150 million in damages.
Ysleta del Sur Pueblo v. Jacobi (See *LLW Notes*, May 1998, pp. 16-17.)	Involves claims of aboriginal rights to the planned site of a low-level radioactive waste disposal facility in Hudspeth County, Texas.	United States District Court for the Western District of Texas	May 12, 1998	Texas filed its answer in response to the Pueblo's complaint.

House/Senate Conferees Meet on Texas Compact

On July 14, a committee of designated appointees of the U.S. Senate and the House of Representatives met to resolve differences between the House and Senate versions of legislation granting congressional approval to the Texas Low-Level Radioactive Waste Disposal Compact. The committee instructed staff to draft a conference report to be submitted to both chambers.

A conference report is expected to be filed the week of July 13, with House action to follow the next week. Senate action is expected soon after. The House and Senate delegations of Maine and Vermont, as well as state officials supporting the legislation, have expressed their opposition to any amendments to the legislation and are hopeful that an unamended version of the bill will be restored by the conference committee.

Background: U.S. Senate

On June 15, the U.S. Senate agreed without objection to name representatives to a conference committee with the U.S. House of Representatives.

Senate Agreement The Senate conferees were named as part of a unanimous consent agreement that also

- instructed the Senate conferees to insist on retention of two Senate amendments to the legislation in the conference report, and
- allowed Senator Paul Wellstone (D-MN) up to one hour of floor time to discuss the amendments, which he had introduced.

Wellstone's remarks, as well as a statement by Senator Olympia Snowe (R-ME), the Senate sponsor of the legislation, are available in the *Congressional Record* for June 15.

Following acceptance of the unanimous consent agreement, the presiding officer of the Senate named as conferees Strom Thurmond (R-SC), Orrin Hatch (R-UT), and Patrick Leahy (D-VT).

All three Senate conferees are members of the Senate Judiciary Committee, the committee of jurisdiction for the legislation in the Senate. Hatch is the Chair of the committee. Leahy is the ranking minority member, as well as a co-sponsor of the Texas Compact consent legislation.

Senate Amendments The two Wellstone amendments were accepted by the bill's Senate sponsors in order to avert a threatened filibuster by Wellstone and to obtain unanimous consent for passage of the legislation on April 1. One of Wellstone's amendments addresses environmental justice issues. The other expands upon an amendment introduced in the House by Representative Lloyd Doggett (D-TX) and would prevent generators from any states except Texas, Maine, and Vermont from using the facility.

Background: U.S. House of Representatives

House Agreement On May 12, the House of Representatives approved, by voice vote, a motion to request a conference with the Senate on the Texas Compact consent legislation. (See *LLW Notes*, May 1998, p.16.) The House did not vote to instruct its conferees.

Named as House conferees were Thomas Bliley, Jr. (R-VA), Dan Schaefer (R-CO), John Dingell (D-MI), Ralph Hall (D-TX), and Joe Barton (R-TX).

All five Representatives named to the conference committee are members of the House Commerce Committee, which has jurisdiction over the bill. Bliley is Chair of that committee, and Dingell the ranking minority member. Schaefer and Barton both chair commerce subcommittees—Energy and Power, and Oversight and Investigations, respectively. Hall is the ranking minority member on the Energy and Power Subcommittee and is a co-sponsor of the bill. Barton is the bill's sponsor.

House Amendment The House bill as passed contains the "Doggett Amendment" preventing waste from being brought into Texas from any state other than Maine or Vermont. (See *LLW Notes*, August/September 1997, pp. 1, 38.) The amended legislation was passed by the House of Representatives after over two-and-a-half hours of debate on the rule for considering the legislation and on the bill itself.

—MAS/TDL

Most of the preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, via facsimile transmission in a News Flash on June 16, 1998.

U.S. General Accounting Office (GAO)

GAO Issues Ward Valley Report, Responds to Congressional Questions re LLRW Disposal

On June 23, the U.S. General Accounting Office (GAO) issued a report—*Radioactive Waste: Answers to Questions Related to the Proposed Ward Valley Low-Level Radioactive Waste Disposal Facility*—in response to a series of questions submitted by U.S. Senator Barbara Boxer (D-CA) and U.S. Representative George Miller (D-CA). Senator Boxer and Representative Miller submitted the questions to GAO shortly after the Senate Energy and Natural Resources Committee held a July 1997 hearing "to review the Department of Interior's handling of the Ward Valley land conveyance, the findings of a new [July 1997] General Accounting Office (GAO) report on the issue, and to receive testimony on S. 964, the Ward Valley Land Transfer Act." (See *LLW Notes*, July 1997, pp. 1, 26-31.)

GAO transmitted the most recent report to the requesters on May 22, but, in accordance with GAO policy, the report did not become publicly available for thirty days after the transmittal date because the requesters did not publicly announce the contents of the report earlier.

GAO Findings in Seven General Areas

GAO grouped the questions into seven general areas. The areas, along with excerpts from the GAO findings for each area, are listed below. The excerpts are taken from both the executive summary to the report and the answers to individual questions. Interested parties are directed to Enclosure One of the GAO report for specific answers to the thirty-two individual questions.

1. Laws and regulations governing Interior's preparation of supplements to environmental impact statements.

Final Environmental Impact Statement

> The final environmental impact statement [jointly issued in April 1991 by the U.S. Bureau of Land Management and California Department of Health Services] recognized the possibility of links between the aquifer beneath Ward Valley and neighboring aquifers but does not assess the potential for contamination of the Colorado River by this means ... Also, the final [environmental impact] statement did not consider the reports and other documents listed in your letter because all of them were issued after the final statement was issued in April 1991.

National Academy of Sciences Report

> The National Academy of Sciences committee concluded that (1) there are conceivable—but unlikely—flow paths for some of the groundwater under Ward Valley to the Colorado River and (2) the potential effects on the river water quality would be insignificant relative to present natural levels in the river and to accepted regulatory health standards. To conservatively assess the effects of conceivable flow paths, the Academy, relying on advice from [the U.S. Nuclear Regulatory Commission] and the Congressional Research Service, assumed that 10 curies of plutonium might be disposed of at each site over a 30-year period and then assumed that all of the plutonium would reach the Colorado River at the same rate it was disposed of. The committee found that under these hypothetical conditions, the effects of the disposal of 10 curies of plutonium on the quality of the river water would be insignificant and the effects of 100 times more plutonium—1,000 curies—would approach, but remain within, regulatory criteria. The committee cautioned, however, that its calculated hypothetical discharge of plutonium in the river would require a combination of circumstances that has an incredibly low probability of occurring ...

continued on page 38

GAO (continued)

2. The laws and regulations on federal land transfers to states.

The Federal Land Policy and Management Act of 1976 is the principal statute applicable to the proposed transfer of land in Ward Valley ... Among other things, the act authorizes the Secretary to transfer public land by direct sale upon determining that the transfer would serve important public objectives that cannot be achieved elsewhere and that outweigh other public objectives and values served by retaining federal ownership of the land. After such a determination, the transfer must be made on terms that the Secretary deems necessary to ensure proper land use and the protection of the public interest ...

The resulting impasse on [how to enforce land transfer conditions] contributed to Interior's decision to prepare a supplemental environmental impact statement and perform the tests at Ward Valley recommended by [NAS].

3. A May 1995 report on Ward Valley issued by the National Academy of Sciences (NAS).

Recommendations

The Academy's committee stated that it did not evaluate the suitability of the Ward Valley site for a disposal facility and was neither endorsing nor condemning the use of the site for that purpose. The committee generally did not agree with the concerns about the safety of the Ward Valley site raised by the three Geological Survey scientists [in a report they had prepared as individuals rather than for an official Geological Survey report]. The committee did conclude, however, that there were significant limitations on the quantity, quality, and accuracy of the field data collected during the scientific investigation of the site ... The committee unanimously recommended that additional sampling for tritium be done to establish base levels for the monitoring program. According to the committee's chairman, the majority of the panel believed that the additional sampling could be done during the construction and operation of the disposal facility.

Findings re Limitations in Collecting Field Data

The Academy's report states that monitoring hydraulic characteristics in dry soils like those at the Ward Valley site is very difficult and, therefore, leads to several limitations in collecting field data ... On the basis of the Academy's experience and understanding of the Ward Valley zone, it is not currently possible to definitively resolve the exact magnitude and direction of the water flux. The report also noted that monitoring hydraulic characteristics in arid unsaturated zones is very difficult because of the lack of methods, procedures, and reliable instruments to measure precisely the hydraulic and hydrochemical characteristics used to estimate the rate of water flow in dry desert soils and pointed out that some of the instruments used are not very robust and have a high failure rate.

4. A former low-level waste disposal facility at Beatty, Nevada.

Both California and US Ecology have considered the Beatty disposal site analogous to the Ward Valley site, but there are dissimilarities between the two sites ...

California Department of Health Services

California's Department of Health Services, in supplemental licensing findings made in June 1994, found that "the Beatty site provides a good analog for the Ward Valley facility." The state's department also maintains, however, that the Beatty facility is severely limited for use as an analog to predict the performance of the Ward Valley facility because disposal practices at the Beatty facility, such as the disposal of waste in liquid form, did not meet many of the technical requirements that would apply to the Ward Valley facility and that would be enforced by stationing two inspectors at the site to observe disposal operations ...

USGS Scientists Acting as Individuals

Finally, in a presentation to the [NAS] committee on Ward Valley, the three Geological Survey geologists pointed out several "significant geologic differences" between the two sites. The geologists suggested that, without additional study of the Beatty site, the site has limited value as an analog for Ward Valley. For this reason, the three geologists recommended additional study to determine the extent to which conditions at Beatty can be used to help predict the performance of other potential disposal facilities in arid climates, such as the proposed Ward Valley facility.

5. An investigation by Interior's Inspector General into the activities of the U.S. Geological Survey related to the Beatty facility.

Interior's Inspector General is investigating three matters related to the Geological Survey's research activities adjacent to the Beatty disposal facility, such as whether the Geological Survey suppressed information in its possession that could have been important to the Academy in its review of Ward Valley issues.

6. The plan and design for the proposed Ward Valley facility.

California and Texas have selected low-level radioactive waste disposal facility designs that do not include liners or do not have systems to capture contaminated liquids that might collect on the liner at the bottom of the trenches. The Nuclear Regulatory Commission (NRC), which has established regulations for disposal facilities for commercially generated low-level radioactive waste, concluded in 1990 that lined trenches are not always required to retard the movement of radioactive materials, meet performance objectives, or facilitate environmental monitoring. At the Ward Valley site, NRC found that liners might increase the long-term risk to human health and the environment by introducing the potential for water to accumulate within a disposal trench that would otherwise remain dry.

Other organizations that have interests in, but not regulatory authority over, the design and construction of the proposed Ward Valley disposal facility, do not agree with NRC's position.

continued on page 40

GAO (continued)

7. The track record of US Ecology (the company hired by California to develop the Ward Valley disposal facility) in operating disposal facilities.

The Nuclear Engineering Company (a predecessor company to US Ecology) was one of three private companies licensed by the Atomic Energy Commission to perform ocean disposal operations. The Nuclear Engineering Company disposed of low-level radioactive waste in the Pacific Ocean between 1961 and 1962; operated now-closed land disposal facilities at Sheffield, Illinois; Maxey Flats, Kentucky; and Beatty, Nevada; and continues to operate a disposal facility at Richland, Washington.

Ocean Disposal

According to the Geological Survey, there is no definitive information about the levels of radiation at the ocean disposal site, which is located off the coast of San Francisco Bay near the Farallon Islands. Visual observations using remote equipment show that many waste drums have ruptured and spilled their contents onto the sea floor.

Sheffield, Illinois

The Sheffield site has not contained wastes, as had been expected ... The last waste was buried at Sheffield in April 1978 ... Tritium was detected migrating toward nearby Trout Lake in 1976 and was detected in the lake in 1982. The tritium advanced about 5 feet per day, or about 600 times faster than had been predicted when the facility was licensed. According to the state, (1) the contamination remains localized and is diminishing, (2) off-site migration of radionuclides from the Sheffield site has never exceeded the maximum permissible concentrations, and (3) no known contamination of nearby drinking water supplies has ever occurred.

Maxey Flats, Kentucky

The Maxey Flats site also has not contained wastes, as had been expected ... Kentucky closed the site in 1977 and then purchased the remaining lease to the disposal operation from NECO [now known as US Ecology] ...The state [of Kentucky] found that the measured levels did not create a public health hazard but did require more intense monitoring ...According to the state, the branch's calculations have shown very low exposures for all pathways and no exposure to the general public that exceed federal or Kentucky regulatory standards ...

Studies by NRC and EPA concluded that the radioactive materials released into the groundwater and air did not appear to have caused significant public health problems, but the potential long-term effects of these contaminants are not known. In 1986, EPA designated Maxey Flats as a "Superfund" site ... Kentucky has paid about $10 million to clean up the Maxey Flats site and also incurs site monitoring, maintenance, and related costs.

Beatty, Nevada

At Beatty, in 1994, the Geological Survey measured "greater than expected" amounts of tritium and carbon-14 in soil gas samples collected at 10 depths ... within a borehole located about 350 feet south of the disposal facility ... The reasons for these unexpected measurements of radioactive contaminants remain unexplained ...

Since 1977, Nevada's Radiological Health Section, Health Division, has regulated the Beatty facility to ensure the site's safety. In December 1997, the health division accepted the transfer of US Ecology's license for the Beatty facility and the responsibility for long-term care and control of the facility ... According to the radiological health section, its review of 2,700 environmental samples collected by US Ecology, EPA, and other sources does not support the Geological Survey's findings of migration of radioactive materials in the vicinity of the Beatty site ...

Furthermore, until 1976, some of US Ecology's employees at Beatty routinely disposed of liquid radioactive waste and removed materials intended for disposal for personal use or sale to others. Both of these practices violated US Ecology's license to operate the facility. In 1979, the Geological Survey ... encountered five containers of radioactive waste outside of the fenced disposal area that had been established on the basis of site maps ... According to [US Ecology's parent company] American Ecology, the fence around the disposal area had been constructed years after the trench had been closed—and apparently on the basis of inaccurate maps.

Finally, in the 1995 through 1997 annual reports of American Ecology, independent public accountants concluded that there was substantial doubt about the company's ability to continue as a going concern. (footnotes omitted)

—LAS

For further information, see "New Materials and Publications."

California DHS Comments re the GAO Report

Carl Lischeske, Manager of the California Department of Health Services' Low-Level Radioactive Waste Program, commented that the GAO report released in June 1998 "confirms the safety of the proposed Ward Valley low-level radioactive waste disposal facility." He noted that the report was requested by opponents of the facility "who framed their questions in an apparent attempt to undermine the conclusions of a previous GAO report that was favorable to the Ward Valley facility." He stated that, nevertheless, GAO's response makes a number of points that are "tremendously positive" for the Ward Valley project, including the following:

- The report shows broad concurrence among respected scientific experts nationwide that the Ward Valley facility will protect ground and surface water, and shows that claims by project opponents about the contamination of the Colorado River are not scientifically supported.
- Scientific, technical, and regulatory support exists for the use of natural materials at the Ward Valley site to safely isolate the waste, as opposed to the use of synthetic liners demanded by project opponents.
- The technology to be employed at the Ward Valley facility is comparable with or superior to that of existing facilities, and disposal practices at Ward Valley will be superior to the practices used at former or existing facilities. In particular, liquid waste that could leak from its containers will not be received at Ward Valley.
- The company licensed by California to build and operate the Ward Valley facility has had a good operating record for the last twenty years. The company has worked responsibly with government officials at older facilities that predated current regulatory standards, and these older facilities present no danger to the public.
- Older facilities are not "identical twins" of the Ward Valley facility, and opponents themselves have questioned the similarities between Ward Valley and other sites.

Plutonium Estimates and Ward Valley

June 1998 GAO Report

U.S. Representative Miller re Plutonium Estimates

Following the release of the GAO report, site opponents—including U.S. Representative George Miller (D-CA)—publicly expressed alarm over the amount of plutonium-239 projected to be disposed of at the planned Ward Valley facility. A June 23 press release issued by Representative Miller states:

> Initially, American Ecology said that only a few ounces of plutonium would be stored at Ward Valley. However, the GAO reports that they have since revised that estimate to as high as 124 pounds of plutonium-239—an amount equal to several dozen nuclear bombs.

GAO re Plutonium Estimates

The GAO report itself states:

> In commenting to our draft report, American Ecology Corporation said that US Ecology had never "projected" that 120 pounds of plutonium would go to Ward Valley. In the license application, according to the corporation, US Ecology projected the most likely amount of plutonium-239 for Ward Valley to be about 0.45 curies or 0.02 pounds; however, in the safety analysis of the site's performance, US Ecology used a conservative estimate based on NRC projections for decontamination available at that time (and later found by NRC and the Congressional Research Service to overestimate the amount by 100 times).
>
> After examining US Ecology's data and methods for estimating an amount of plutonium, the Congressional Research Service generally agreed with US Ecology that the revised, larger projection was unrealistically high. According to the Congressional Research Service, NRC made an error in the original analysis upon which US Ecology had made its revised estimate. Correcting the error would reduce the estimated amount of plutonium bound for the Ward Valley disposal facility to about 1.3 pounds.

Previous Discussions of Plutonium Estimates

December 1993

> I am writing to provide the information you requested on potential disposal of waste containing plutonium, and chelating agents, at the recently licensed Ward Valley low-level radioactive waste (LLRW) disposal facility.
>
> Manifest shipment record data indicates that less than 4 curies and 1.4 grams of plutonium from the Southwestern Compact were shipped for disposal from 1988 through 1992. Prorating over the 30 year operating life of the Ward Valley facility suggests a total plutonium inventory of approximately 2.5 grams (less than 0.1 ounce); not 100 pounds ... An overestimate (i.e. the Dresden I experience [a Boiling Water Reactor in Illinois]) was used in the license application for decontamination waste to provide added conservatism to the safety analysis.

Letter from Stephen Romano, Vice President, US Ecology, to Steve LaRue, San Diego Union. December 21, 1993.

March 1994

> We now know that the waste stream representations made by [the California Department of Health Services (DHS)] during the public review process were false ... The amount of Plutonium-239, for example, is increased over 7,000-fold, from 0.45 curies to 3,500 curies.

Letter from U.S. Senator Barbara Boxer to California Governor Pete Wilson. March 17, 1994.

> Based on review of historic waste shipment records, the License Application submitted to DHS in January 1990 projected that approximately .45 curies of plutonium-239 from normal reactor operations and non-fuel cycle waste producers would be received for disposal during the 30 year operating life of the Ward Valley facility ... As is consistently stated in the [Environmental Impact Report/Statement], and our licensing interrogatory response, 303,875 curies of decon-

tamination wastes, including approximately 3,500 curies of plutonium-239, were employed for analysis purposes to provide a wide margin of safety in analysis of the site's performance—not for the purpose of projecting actual waste receipt.

Letter from Stephen Romano, Vice President, US Ecology, to U.S. Senator Barbara Boxer. March 30, 1994.

April 1994

The 3,500 curies of plutonium is not a waste stream projection but a deliberately much exaggerated overestimate which DHS used to err heavily on the side of safety. As described throughout the Administrative Record, .45 curies is the waste stream actually projected from historical data. The analysis based on 3,500 curies represents a conscious effort to assure over-capacity and safeguards far, far beyond possible need, to account for some uncertainty concerning decontamination wastes.

Letter from California Governor Pete Wilson to U.S. Senator Barbara Boxer. April 27, 1994. (emphasis in original)

May 1994

Documents prepared by both DHS and US Ecology clearly state that the new, much higher figures for nuclear power plant wastes—including the 7,000-fold increase for Plutonium-239—represent, not a worst case scenario, but an accurate estimate of the amount of wastes that will actually be buried at Ward Valley.

Letter from U.S. Senator Barbara Boxer to California Governor Pete Wilson. May 9, 1994.

September 1994

Based upon this information, one can conclude with considerable assurance that the quantities of primary coolant loop decontamination waste generated in the Southwest Compact will contain far less Pu-239 than the 3,447 curies hypothetically applied in the License Application performance assessment ... There will not be 124 pounds of Pu-239 disposed at Ward Valley. At most there will be a fraction of a curie to two curies of Pu-239 from decontamination waste, and a fraction of a curie to several curies from other sources. The 3,500 curies was hypothetical only. Reality is, as I have described, quite different.

Letter from Elisabeth Brandt, Chief Counsel, and Peter Baldridge, Staff Attorney, California DHS, to Ina Alterman, Board on Radioactive Waste Management, National Academy of Sciences (NAS). September 22, 1994.

November 1994

The [NAS Panel on Ward Valley], convened to evaluate earth science and ecological issues, has no radiological expert on the committee. For this reason, we would appreciate it if [U.S. Nuclear Regulatory Commission] experts could review the discussion provided in the [September 1994] letter from [California DHS] and the consequent revision of the estimate of the amount of Pu-239 that is expected to go into such a facility. The [NAS] committee would especially like to know if either of the estimates are reasonable, or, if not, what would be a conservatively realistic estimate.

Letter from Ina Alterman, Board on Radioactive Waste Management, National Academy of Sciences, to Paul Lohaus, Deputy Director of the Office of State Programs, U.S. Nuclear Regulatory Commission (NRC). November 10, 1994.

To summarize, our data of decontamination of nuclear plants, the major contributor of [Plutonium-239] to the Ward Valley source term for this isotope, shows values of [Plutonium-239] in the range of a fraction of a curie to a few curies ... Although there are many variables that will affect the amount of [Plutonium-239] that will be disposed at Ward Valley, based on the review described in this letter, we agree with the DHS estimate of several curies of [Plutonium-239].

Letter from Malcolm Knapp, Director, Division of Waste Management, NRC, to Ina Alterman, Board on Radioactive Waste Management, NAS. November 23, 1994.

continued on page 44

December 1994

In conclusion, the large discrepancy between [Plutonium] values calculated from the information in the DEIS [Draft Environmental Impact Statement] for [10 CFR] Part 61, NUREG-0782 and calculations based on actual disposal records and decontamination data, are primarily due to a two order of magnitude typographical error. ... Thus one would expect at least a three order of magnitude discrepancy between [Plutonium] values calculated using the old DEIS information and actual disposal data for [Plutonium].

Memo from Andrew Campbell, Performance Assessment and Hydrology Branch, NRC, to James Kennedy, Low-Level Waste and Decommissioning Branch, NRC. December 5, 1994.

In the wake of recent revelations of widespread safety problems with plutonium stored at government nuclear installations, a nuclear watchdog group today accused the U.S. Nuclear Regulatory Commission (NRC) of "cooking the books" in an attempt to suppress official agency estimates of the large amount of plutonium at commercial "low-level" radioactive waste dumps.

News Release, Nuclear Information and Resource Service. December 8, 1994.

On November 23, 1994, I sent to you the results of our review of the California [DHS] estimates for [Plutonium-239] projected to be disposed of at the proposed Ward Valley facility. We agreed with DHS' estimate of several curies ... The enclosure [the December 5 NRC memo] is a new analysis of the original Plutonium-239 estimates in the DEIS. The new analysis shows that the estimated inventory for this isotope reported in the DEIS was high by two orders of magnitude. This analysis further confirms the conclusion provided in our November 23, 1994, letter.

Letter from Malcolm Knapp, Director, Division of Waste Management, to Ina Alterman, Board on Radioactive Waste Management, National Academy of Sciences. December 14, 1994.

May 1995

While there are conceivable, but unlikely flow-paths for some ground water within Ward Valley to reach the Colorado River, the [NAS Committee on Ward Valley] concludes from conservative bounding calculations that, even if all 10 curies (Ci) of plutonium-239 expected in the facility were to reach the river, the potential impacts on the riverwater quality would be insignificant relative to present natural levels of radionuclides in the river and to accepted regulatory health standards …

Even if the released plutonium quantity were ... 1000 curies [100 times greater than assumed], the maximum hypothetical impact on the Colorado River concentrations would ... remain less than the health-based regulatorary criterion ...

Ward Valley: An Examination of Seven Issues in Earth Sciences and Ecology, National Academy of Sciences. May 1995.

August 1995

No evidence was developed during the investigation that any NRC staff member intentionally distorted information in order to assist the Ward Valley licensing.

Report of Investigation, Alleged NRC Cover-Up Involving Ward Valley, Office of Inspector General, NRC. August 1, 1995.

The results of the NRC Office of Inspector General investigations clearly show that the opponents of Ward Valley had no data to support their allegations. Hopefully, the entire plutonium argument can now be put to rest.

Statement, California DHS. August 1, 1995.

—LAS

For further information regarding plutonium estimates and the Ward Valley low-level radioactive waste disposal facility, please see the following issues of the LLW Notes: Aug./Sept. 1995, pp. 22-25; LLW Notes Supplement, June 1995, pp. 3–11; Jan./Feb. 1995, pp. 26-29; Nov./Dec. 1994, pp. 15-16; and May/June 1994, pp. 14-15.

Congress Continues Work on FY 1999 Appropriations

As FY 1999 approaches, Congress is working hard to complete the appropriations process and to avoid a partial government shutdown as has occurred in past years. The following is a brief summary of the budgetary outlook for some of the key agencies and departments. Persons interested in a more detailed analysis are directed to the appropriations measures themselves.

U.S. Department of Energy The administration has requested approximately $17 billion for DOE for FY 1999, a significant increase from the $15.84 billion allocated in FY 1998.

The U.S. House of Representatives passed its version of the Energy and Water Bill—which contains, among others, DOE appropriations—on June 22. The House, however, scaled the administration's request for DOE FY 1999 funding back to $16.2 billion. Of that figure, DOE's privatization initiative is assigned $286 million instead of the $516 million requested by the administration.

The Senate passed its version of the Energy and Water Bill on June 18. The Senate version allocates $16.47 billion to DOE for FY 1999 funding, of which $3.8 billion is slated for the Army Corps of Engineers' budget.

The Energy and Water Bill is expected to go to conference in late July.

U.S. Nuclear Regulatory Commission NRC appropriations are also contained in the Energy and Water Bill. The House version of the bill allocates $462.7 million to the commission for FY 1999.

U.S. Department of the Interior The administration has requested approximately $14.92 billion for the Interior Department and related agencies for FY 1999, a significant increase over the $13.8 billion allocated in FY 1998.

The House Committee on Appropriations' Subcommittee on Interior and Related Agencies has reduced the administration's request, however, allocating $13.4 billion in its version of the FY 1999 appropriations bill. This recommendation was accepted by the House Appropriations Committee, which passed its version of the spending bill on June 25. The full House is expected to take up the bill in mid-July.

The Senate Appropriations Committee approved its FY 1999 spending bill for the Interior Department and related agencies on June 25. Like its counterpart in the House, the Senate Appropriations Committee reduced the administration's request to $13.4 billion, of which $8.1 billion is allocated to the Interior Department. The full Senate is expected to take up the bill shortly.

U.S. Environmental Protection Agency The administration only requested a modest increase in appropriations for EPA in FY 1999—$7.795 billion in comparison with the FY 1998 allocation of $7.365 billion.

The VA, HUD, and Independent Agencies Subcommittee of the House Committee on Appropriations is recommending that the agency be allocated $7.423 billion, whereas the Senate subcommittee is recommending $7.415 billion. The House Appropriations Committee marked up its FY 1999 spending bill for EPA and other agencies on June 25, for the most part accepting the subcommittee's recommendations. The Senate Appropriations Committee passed its version of the bill, which was substantially similar to that recommended by the subcommittee, on June 11, 1998.

The Senate and the House are each expected to soon consider their respective versions of the spending bill.

—TDL

New Materials and Publications

Document Distribution Key	
P Forum Participants	D LLW Forum Document Recipients
A Alternate Forum Participants	N *LLW Notes* and *Meeting Report* Recipients
E Forum Federal Liaisons	M Meeting Packet Recipients
L Forum Federal Alternates	

LLW Forum

N *LLW Forum Meeting Report.* Afton Associates, Inc. May 1998. Proceedings from the LLW Forum meeting, May 27-29, 1998. (Distributed on June 20, 1998.)

DM *Presentation to Low-Level Radioactive Waste Forum.* Hard copies of slides presented by George Antonucci, Chem-Nuclear Systems, at the LLW Forum meeting. Contains information on the 1998-99 Barnwell pricing plan and the long-term initiative to ensure continuing access.

PA *Prospectus: The Impact of United States Low-Level Radioactive Waste Management Policy on Biomedical Research*. (Distributed at the LLW Forum meeting.)

D *Presentation to the Low-Level Radioactive Waste Forum.* Hard copies of slides presented by Paul Genoa, Senior Project Manager, Nuclear Energy Institute, at the LLW Forum meeting. Concerns voluntary financial contributions from utilities to support South Carolina higher education grants for FY 1997-98.

States and Compacts

Northeast Compact/ Connecticut/New Jersey

Status Report: Managing Low-Level Radioactive Waste in New Jersey, 1987-1998 and Beyond. June 1998. New Jersey Low-Level Radioactive Waste Disposal Siting Board. This report contains a brief history of New Jersey's efforts to site a low-level radioactive waste disposal facility. For additional information, contact John Weingart of the New Jersey siting board at (609)777-4247.

Federal Agencies

Nuclear Regulatory Commission

Effects on Radionuclide Concentrations by Cement/Ground-Water Interactions in Support of Performance Assessment of Low-Level Radioactive Waste Disposal Facilities. (NUREG/CR-6377, PNNL-11408.) May 1998. NRC is developing a Branch Technical Position document that provides guidance regarding the performance assessment of LLRW disposal facilities. In support of this effort, NRC compiled this report on the effects of cement/groundwater interactions on radionuclide concentrations. To obtain a copy, contact the NRC public document room.

Consolidated Guidance about Materials Licenses: Program-Specific Guidance about Academic, Research & Development, and Other Licenses of Limited Scope. (NUREG-1556, Volume 7.) May 1998. This draft NUREG combines and updates the guidance for applicants and licensees previously found in Regulatory Guide 10.2, Revision 1, Regulatory Guide 10.7 and Regulatory Guide FC 405-4. This report also contains information found in Technical Assistance Requests and Information Notices. Comments on this draft report are due by September 30. To obtain a copy, contact the NRC public document room.

U.S. Congress

General Accounting Office

Clear Strategy on External Regulation Needed for Worker and Nuclear Facility Safety. (GAO/T-RCED-98-205.) May 21, 1998. Testimony on the progress being made by DOE toward the external regulation of both worker safety and nuclear facility safety. To obtain a copy, contact the GAO document room.

Radioactive Waste: Answers to Questions Related to the Proposed Ward Valley Low-Level Radioactive Waste Disposal Facility. (GAO/RCED-98-40R.) May 22, 1998. Report responding to questions raised by Senator Boxer (D-CA) and Representative Miller (D-CA) regarding the proposed low-level radioactive waste disposal facility in Ward Valley, California. To obtain a copy of this report, contact the GAO document room.

–RTG

To Obtain Federal Government Information

by telephone

- DOE Public Affairs/Press Office . . . . . .(202)586-5806
- DOE Distribution Center . . . . . .(202)586-9642
- DOE's National Low-Level Waste Management Program Document Center . . . . . .(208)526-6927
- EPA Information Resources Center . . . . . .(202)260-5922
- GAO Document Room . . . . . .(202)512-6000
- Government Printing Office (to order entire *Federal Register* notices) . . . . . .(202)512-1800
- NRC Public Document Room . . . . . .(202)634-3273
- Legislative Resource Center (to order U.S. House of Representatives documents) . . . . . .(202)226-5200
- U.S. Senate Document Room . . . . . .(202)224-7860

by internet

- EPA Listserve Network • Contact Terri Dickson at (202)260-9581 or e-mail (leave subject blank and type help in body of message) . . . . . .listserver@unixmail.rtpnc.epa.gov
- U.S. Government Printing Office (GPO) (for the *Congressional Record*, *Federal Register*, congressional bills and other documents and access to more than 70 government databases) . . http://www.gpo.gov/su_docs/
- DOE's National Low-Level Waste Management Program, Document Information http://199.44.46.229/radwaste/
- GAO homepage (access to reports and testimony) . . . . . **http://www.gao.gov/**

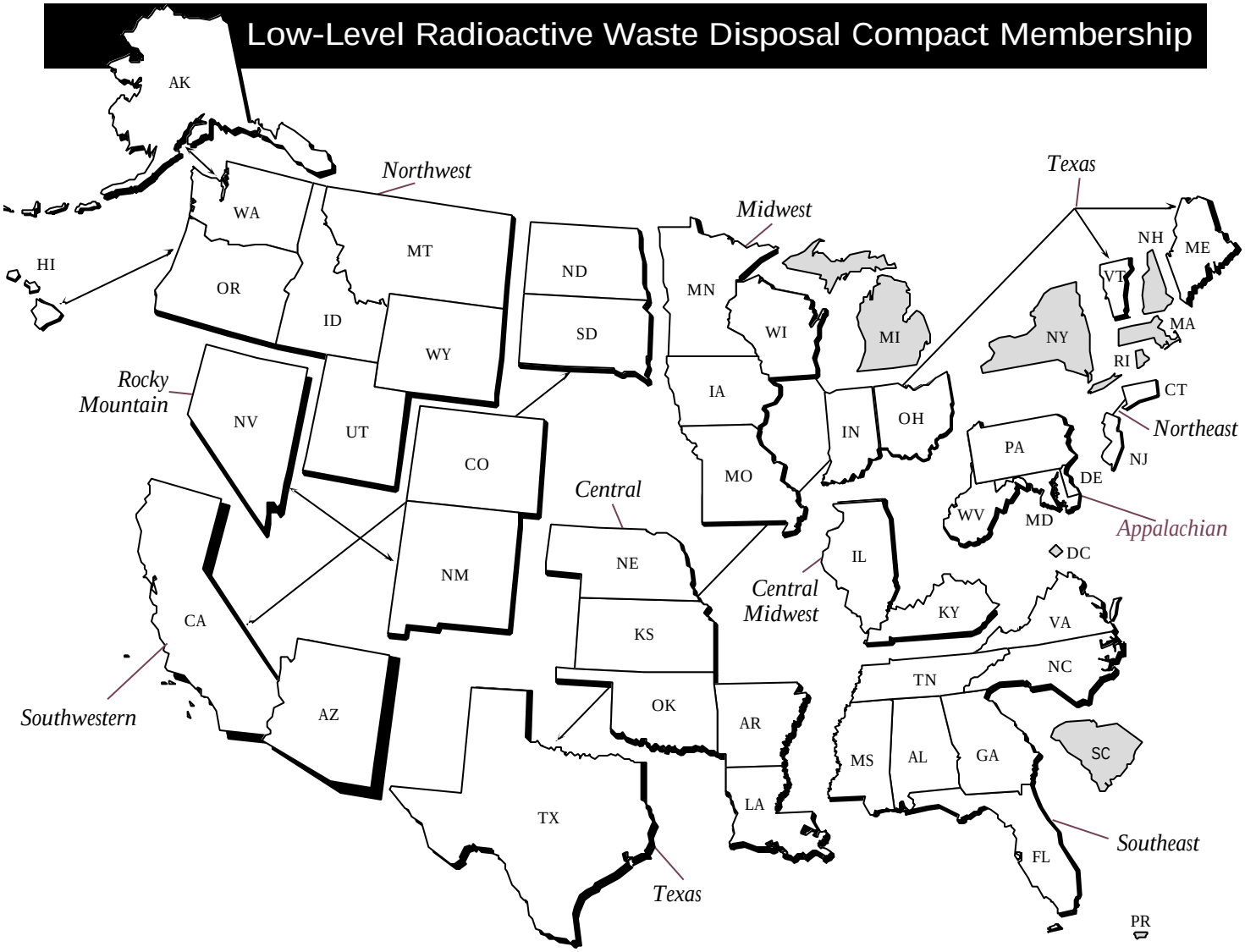
To access a variety of documents through numerous links, visit the LLW Forum web site at http://www.afton.com/llwforum

Accessing LLW Forum Documents on the Web

LLW Notes, *LLW Forum Meeting Reports* and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to state, compact, and federal officials designated by LLW Forum Participants or Federal Liaisons. As of March 1998, *LLW Notes* and *LLW Forum Meeting Reports* are also available on the LLW Forum web site at http://www.afton.com/llwforum. The *Summary Report* and accompanying *Development Chart*, as well as *LLW Forum News Flashes*, have been available on the LLW Forum web site since January 1997.

As of March 1996, back issues of these publications are available from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (703)605-6000.

Low-Level Radioactive Waste Disposal Compact Membership



Appalachian Compact
Delaware
Maryland
Pennsylvania *
West Virginia

Central Compact
Arkansas
Kansas
Louisiana
Nebraska *
Oklahoma

Central Midwest Compact
Illinois *
Kentucky

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
Washington * •
Wyoming

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Northwest accepts Rocky Mountain waste as agreed between compacts.

Northeast Compact
Connecticut *
New Jersey *

Southeast Compact
Alabama
Florida
Georgia
Mississippi
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

The compact has been passed by all three states and awaits consent by the U.S. Congress.

Unaffiliated States
District of Columbia
Massachusetts
Michigan
New Hampshire
New York
Puerto Rico
Rhode Island
South Carolina •

The Low-Level Radioactive Waste Forum includes a representative from each regional compact, each designated future host state of a compact *, each state with a currently operating facility •, and each unaffiliated state.